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No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

U. S. Metroline Services, Inc.,

Petitioner,

v.

Southwestern Bell Telephone Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. Whether, after remand by this Court in light of its *Ticor* decision dealing with the Court's *Midcal* tests to be applied to Respondent's claim of state action immunity from the antitrust laws, the circuit court could properly hold that its earlier decision on injunctive relief, which found the first prong of the *Midcal* test satisfied, became " the law of the case" in a subsequent appeal dealing with a Rule 12(b)(6) motion to dismiss.

2. Whether, after remand by this Court in light of its *Ticor* decision, in an appeal of the granting of Respondent's Rule 12(b)(6) motion to dismiss based on state action immunity, it was permissible for the circuit court to: (A) convert Respondent's anticompetitive conduct challenged in Petitioner's complaint — threatening to cut off a competitor's telephone lines — into a challenge to the state's general ratemaking and rate application process; (B) converting Petitioner's appeal from an order granting Respondent's Rule 12(b)(6) motion to dismiss into an appeal of a non-existent motion and order on summary judgment.

3. Whether, after remand by this Court in light of its *Ticor* decision, it was permissible for the circuit court to apply the second prong of the *Midcal* test to the state's general ratemaking and the rate application process rather than applying the *Ticor* standard for the second prong to the challenged anticompetitive conduct of Respondent by examining the facts in the Record or by remanding that fact issue to the district court.

4. Whether, after remand by this Court in light of its *Ticor* decision, (A) the relevant market concept in *Ticor* and *Cantor v. Detroit Edison Co.* applies, and (B) the filed tariff doctrine does not apply, to a private telephone company's challenged anticompetitive conduct in a competitive market so that conduct is not shielded from antitrust liability by the telephone company claiming its anticompetitive conduct in a competitive market is justified by a (non-rate) tariff it claims to be filed with the state regulatory agency.

Parties to the Proceeding

The two parties are U.S. Metroline Services, Inc., Petitioner, and Southwestern Bell Telephone Company, Inc.[1] , Respondent, as listed in the caption.

[1] Southwestern Bell Corporation is the parent company of Southwestern Bell Telephone Company, Inc.

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Petition for Writ of Certiorari

U.S. Metroline Services, Inc. prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in this case on April 19, 1993.

Opinions Below

The opinion of the Fifth Circuit Court of Appeals, dated April 19, 1993, is reported at 988 F.2d 601 and is set forth at Appendix A. The Fifth Circuit rendered this opinion after this Court granted Petitioner's writ of certiorari and vacated the judgment in its decision which is reported at 112 S.Ct. 2987 (1992), and is set forth at Appendix B.

The opinion of the Fifth Circuit Court of Appeals, dated October 23, 1991 and which is unreported, is set forth at Appendix D. The Memorandum Order and Judgment of the district court dated February 27, 1991, are set forth at Appendix E.

The Per Curium Opinion are of the Fifth Circuit Court of Appeals, dated May 29, 1990, is reported at 901 F.2d 1267 and is set forth at Appendix G. The Fifth Circuit's order denying Petitioner's motion for rehearing is set forth at Appendix F. The Memorandum Order of the District Court, dated August 30, 1989, is set forth at Appendix H.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 1993. This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254(1).

Constitutional & Statutory Provisions Involved

The constitutional and statutory provisions involved in this case are set forth in the Appendix as follows:

- Article VI, Clause 2 of the United States Constitution. (Appendix I)
- Sherman Antitrust Act, 15 U.S.C. § 2. (Appendix J)
- Sherman Antitrust Act, 15 U.S.C. § 15(a). (Appendix J)

- Texas Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. art. 1446c. (Appendix K)

Statement of the Case

Petitioner U.S. Metroline filed this antitrust suit, seeking both injunctive relief and damages for Respondent Southwestern Bell's violation of the federal antitrust laws in threatening to cut off Petitioner's telephone lines it must use to provide a metro service in competition with Respondent and other communications companies. However, by declaring that Respondent had broad immunity under the federal antitrust laws, the district court denied Petitioner both an evidentiary hearing and a trial on either the injunctive relief or damage claims. (Appendix H, on injunctive relief; Appendix E, on damages). After two rounds of appeals (Appendices D, E, F, G, and H), on certiorari (Appendix B), this Court concluded that the lower courts had erred in granting "state action" antitrust immunity to the Respondent by vacating the judgment and remanding the case to the Fifth Circuit Court of Appeals "... for further consideration in light of [this Court's recent decision in] *Federal Trade Commission v. Ticor Title Ins. Co.*, 504 U.S.___, 112 S.Ct. 2169 (1992)." (*Ticor* is Appendix C). On remand, the court of appeals entirely failed to comply with this Court's directive. Thus, Petitioner must ask this Court to review once again the issue of Respondent's claimed immunity under the antitrust laws.

In metropolitan areas such as Dallas-Ft. Worth, composed of two or more cities, many businesses sell their products or services throughout the metropolitan area, treating it as one single market, and having a need for frequent calling throughout the metropolitan area, without paying long distance charges. That need is met by a communications service commonly known as "metro service," a service which is neither local telephone service nor long distance telephone service, but is in a third category of those varied communications services provided by several private communications companies. Petitioner is a small communications company which has been providing metro service in the Dallas-Ft. Worth

metropolitan area for four years, since early 1988. Petitioner is one of several companies which also provide metro services, competing directly with each other and with metro service provided by Respondent Southwestern Bell. In addition, the Respondent is a monopoly local telephone company and therefore is the sole provider of the local telephone lines essential for one part of the operation of the metro services of all the competitors.

In June, 1989, Respondent Southwestern Bell threatened to cut off all of Petitioner's local telephone lines which it had been leasing from Respondent for a year and a half. (the "challenged conduct") (Appendix P). That action, if taken, would have immediately terminated Petitioner's business. Respondent's admitted reason for threatening to terminate Petitioner's telephone lines, was that Petitioner was taking metro service customers away from Respondent, as Respondent's employee Iven testified, corroborated by the testimony of two other witnesses. (Record at Tab 19, Plaintiff's Appendix of Relevant Facts, Vol. IV [hereafter, "R., Tab ___, Pltf. Appdx."])[2]

Respondent claimed that cutting off Petitioner's local telephone lines was justified by its "resale prohibition" tariff which it had filed with the Public Utility Commission of Texas ("PUC").

Petitioner filed suit in the federal district court, seeking injunctive relief, and alternative damages, under the antitrust laws. The district court refused to conduct an evidentiary hearing on Petitioner's application for preliminary injunction, instructing the parties to conduct discovery through document requests and by depositions and then to file briefs supported by excerpts of the discovery evidence. The parties did so. The district court did not refer to the Record, reciting only assertions in the brief of Respondent Sourthwestern Bell in its first Memorandum Order.

In its August 30, 1989 Memorandum Order (Appendix H), the district court denied a preliminary injunction. The court held that Petitioner could not show the necessary injunctive element of

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[2] Evidence for Petitioner is at Record 21 and Binders "A-1," "A-2," "A-3," and "E." Evidence for Respondent is at Record 23 and Binders "B," "C" and "D."

probable success on the merits because the "challenged conduct" was the setting of rates by the PUC and, therefore, the two-pronged test of this Court's *Midcal* decision was satisfied by the Texas PURA. There is no evidence in the Record of any PUC rate settings or rate orders. There is no evidence in the Record of any verified tariffs or of any PUC activity, actions, proceedings, or orders approving or reviewing the above challenged conduct of Respondent, nor is there any evidence in the Record of any approved rates, rate-making proceedings or orders of the PUC which relate to the challenged conduct of Respondent.

The court also held that Petitioner could not show irreparable injury because being put out of business, due to termination of a contract at will, could be compensated in money damages. There was no evidence in the Record of any contract at will. The evidence showed Petitioner was operating profitably, but that communications customers will leave a communications provider like Petitioner, and not return, if its communications service is interrupted or terminated.

The circuit court's *per curiam* opinion affirmed the district court, holding that the case involved "private state-regulated ratemaking" and, since Respondent "clearly meets" the *Midcal* tests, "there is no likelihood of success on the merits." (Appendix G4 n.6). However, the court also rejected Respondent's argument that the PUC had exclusive original jurisdiction over the "private state-regulated ratemaking" because the complaint alleged an antitrust violation within federal jurisdiction, and "[w]hether Bell is thus immunized is a federal question to be litigated in federal court." (*Id.* at G4). There was no explanation of these contradictions. The circuit court also held that there was no irreparable injury since, Petitioner could be compensated with damages at the later trial on the merits. (*Id.* at G5). Petitioner's motion for rehearing and suggestion for rehearing en banc were denied on July 3, 1990. (Appendix F). Petitioner filed with this Court, on September 28, 1990, a Petition for Writ of Certiorari, which was denied.

Subsequently, the trial court granted Respondent's motion to dismiss under Rule 12(b)(6) in its February 27, 1991 Memorandum Order and Final Judgment (Appendix E), relying only upon its conclusions in its earlier August 30, 1989 Memorandum Order. (Appendix H).

The circuit court affirmed the district court's opinion, stating that, in the prior injunction appeal, it had decided the issue of Respondent's immunity from antitrust liability under the state action doctrine, which was the "law of the case," without addressing the different standards for injunctive relief and a Rule 12(b)(6) motion to dismiss. (Appendix D).

Granting Petitioner's January 21, 1992 Petition for Writ of Certiorari, this Court vacated the judgment and remanded the case to the Fifth Circuit for further consideration in light of this Court's decision in *Ticor*. (Appendix B).

On remand, the court below affirmed its earlier judgment granting antitrust immunity to Respondent, by (1) reasserting the "law of the case" doctrine to refrain from applying *Ticor* and the first prong of the *Midcal* test to the Texas PURA; (2) converting Respondent's anticompetitive conduct challenged in Petitioner's complaint into the state's general ratemaking and the rate application process; (3) converting the appeal from an order on a Rule 12(b)(6) motion to dismiss into an appeal of a non-existent Rule 56 motion for summary judgment; and (4) applying the second prong of *Midcal* test to the state's general ratemaking and Respondent's application of rates, rather than following *Ticor* by examining the facts in the Record to determine of there was evidence, in fact, of active state supervision of respondent's threat to cut off the telephone lines of competitor Petitioner — or remanding that fact issue to the district court.

Reasons for Granting the Writ

The astounding and egregious conduct of the court below, however, should not overshadow the magnitude of that court's grave error in granting antitrust immunity to the Respondent Southwestern Bell, by openly flaunting the *Midcal* and *Ticor* standards of this Court.

After almost 100 years of pervasive and unlawful monopoly conditions in the nation's telecommunications industry—the largest single industry in the United States—the federal courts and the FCC have spent the past 24 years establishing and implementing a national policy which protects and encourages competition in that immense and expanding industry. The decision of the court below, however, undermines that policy.

The magnitude of the immunity wrongfully granted to Respondent can be measured in part by the magnitude of the Respondent and the scope of its operations in both regulated and competitive arenas of the national and international communications industry. (See Appendix M).

From the late 1870s to the late 1960s, the entire telecommunications infrastructure was dominated by one company, AT&T and its 22 Bell Operating Companies (*e.g.*, Chesapeake and Potomac Bell, New Jersey Bell, Southwestern Bell) which comprised a unified, nationwide Bell Telephone System.

In 1968, however, the FCC's *Carterfone* decision[3] opened up the telephone equipment markets to free competition. In 1970, the FCC's *MCI* and subsequent *Specialized Carriers*[4] decisions opened up the long distance telephone markets to competition. Providing appropriate injunctive relief and necessary appellate decisions, the federal courts stepped up the enforcement of both FCC orders and the antitrust laws to provide the necessary legal

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[3] *Carterfone v. AT&T*, 13 F.C.C.2d 420 (1968).

[4] *Microwave Communications, Inc.*, 18 F.C.C.2d 953 (1969); *Specialized Common Carrier Services*, 29 F.C.C.2d 870 (1971), *aff'd sub. nom. Washington Utilities & Transportation Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975).

policy and framework for the growth of competition in telecommunications.[5] The legislature in Texas also did its part by enacting a modern statute, the PURA. (full text reprinted at Appendix K).

Passed in 1975, and amended on several occasions afterwards, the Texas PURA is a unique utility regulatory statute, for it announced new policies and provided new tools to accommodate (i) necessary regulation of dominant utilities operating in a monopoly market, on the one hand, with (ii) protections and encouragement of competitive businesses and markets, on the other hand. As the telecommunications industry has rapidly evolved toward competitive markets, the Texas PURA also has evolved to mirror the important developments in federal policy.

1. The circuit court's holding that its prior decision on the first prong of *Midcal* in a prior appeal granting Southwestern Bell's immunity from antitrust liability is the "law of the case" on a remand by this Court in light of its *Ticor* decision is clearly erroneous.

The circuit court erred in applying the "law of the case" doctrine on several grounds. First, the entire judgment of the circuit court was vacated by the Supreme Court. Had the Supreme Court merely wanted the circuit court to examine only the application of the second prong of *Midcal* to this case, it would have done so by vacating in part and remanding in part as to the second prong only. This court did not do so. (Appendix B.) Both prongs of *Midcal* are closely interrelated. *Ticor* at 2178. Therefore, on a remand made in light of *Ticor*, the Circuit Court had the duty to address both prongs of the *Midcal* test.

On remand, the circuit court glossed over the first prong of *Midcal* by saying it had previously decided that issue, "...i.e., that Texas has expressly authorized *the regulation*," in the earlier

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[5] *E.g., North Carolina Utilities Commission v. FCC*, 552 F.2d 1036 (4th Cir. 1977); *United States v. American Telephone & Telegraph Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1001 (1983); *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 464 U.S. 891 (1983). There are a host of other federal decisions in this area, throughout the 1970s and 1980s.

appeals. (Appendix A8). (What "the regulation" is was not explained, nor is there any "regulation" involved in the facts of this case). In its *per curiam* opinion in the first appeal, dealing only with the denial of injunctive relief, the circuit court necessarily focused upon the issue on appeal—namely, whether the Petitioner had established the prerequisites for preliminary injunctive relief. The circuit court's *holding* was that Plaintiff had failed to show *irreparable injury* (which was the subject of the bulk of the oral argument before the panel on April 3, 1990). Whether as an afterthought, a comment or otherwise — but clearly only dictum — Footnote 6 of the Court's *per curiam* opinion (Appendix G4 n.6) did not become the "law of the case" in the first opinion. On the second appeal, from the trial court's order granting Respondent's Rule 12(b)(6) motion to dismiss, neither prong of the *Midcal* test was examined or ruled on because the circuit court utilized the "law of the case" purportedly established in the above dictum in the first appeal. But dicta has no preclusive effect under the law of the case doctrine. *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990).

In neither the first nor the second appeal did the circuit court ever address or analyze the standards for application of Midcal's first prong. The subsequent remand by this court of the opinion of the court below in the second appeal is no occasion for that court to again attempt to apply the same device.

Ordinarily, affirmative defenses such as immunity may not be raised by a motion to dismiss. *Scott v. Kuhlmann*, 746 F.2d 1377, 1378 (9th Cir. 1984). Here, Respondent never filed an answer or raised any affirmative defense. Both the trial court and the Circuit Court failed to recognize that, under virtually all factual scenarios, Respondent could not present the necessary facts, at least on the second prong of the *Midcal* test, to obtain immunity from antitrust liability by the granting or the affirming of a motion to dismiss. Whether Respondent even can plead or prevail on a claim of immunity in a Rule 12(b)(6) motion necessarily involves law *and* fact issues that should be decided on the merits. *Lifton v. Keuker*, 850 F.2d 73, 76 (2d Cir. 1988).

By characterizing its decision disposing of a motion for preliminary injunctive relief as the law of the case to a substantive issue, the court of appeals committed clear error. The circuit court disregarded the important difference between the tests applicable to preliminary injunction and the strict test to uphold the granting of a Rule 12(b)(6) motion to dismiss. The district court's granting of the Rule 12(b)(6) motion meant that it necessarily ruled as a matter of law that "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). This test is far different from the injunctive element of "the likelihood of success on the merits," which a plaintiff must establish in order to obtain injunctive relief. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 760 F.2d 618, 621 (5th Cir. 1985).

It is error to apply a holding in a preliminary injunction as the law of the case in a subsequent trial (or disposition) on the merits. An argument that a determination made at a preliminary injunction hearing is the law of the case in a subsequent hearing on a motion to dismiss, for example, ignores the difference in tests applicable to a preliminary injunction and a Rule 12(b)(6) motion to dismiss. *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. den'd* 479 U.S. 1103 (1987) [differences in the two standards].

Indeed, the court below, in its first opinion, distinguished between denial of an injunction and a subsequent damage trial on the merits. (Appendix G5).

However, in its opinion on the Rule 12(b)(6) appeal, the second appeal, the circuit court used the "law of the case" to entirely refrain from addressing or analyzing either prong of the *Midcal* test. (Appendix D). Therefore, for the Circuit Court to conclude in both its second and third opinions (Appendices D and A) that its first per curiam opinion on injunctive relief (Appendix G) established the law of the case with respect to the first prong of *Midcal, after* this Court's remand, is error. *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1086 (5th Cir. 1992).

This Court's order of remand specifically directed the Fifth Circuit to reconsider this case in light of *Ticor*, which clarified *both Midcal* tests for determining what activities qualify for state action immunity from the antitrust laws. The court below should have applied both tests following *Ticor*.

Finally, although the circuit court has erred twice in applying the law of the case doctrine in this case, the Supreme Court is not bound by the law of the case doctrine. *Christianson v. Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2178 (1988).

2. The circuit court erred in converting the Respondent's anticompetitive conduct challenged in Petitioner's complaint to a general utility ratemaking matter, ignoring *Ticor*'s standards and thereby endangering national and state policies encouraging competition in telecommunications and immunizing a major player in that industry, the Respondent.

Although the *Ticor* decision was more focused on the second prong of the *Midcal* test, its importance to state action immunity jurisprudence is not so limited. This Court stated that the two prongs of the *Midcal* test must be seen as interrelated. *Ticor*, 112 S.Ct. at 2178.

Ticor directs a court to scrutinize the *specific challenged conduct* pled in the antitrust complaint, *not* merely discuss the scope or nature of the regulation of an industry in general. Precisely because the two prongs of *Midcal* are closely interrelated, that careful focus is dictated by *both* prongs of *Midcal*, not just the second prong. The message of *Ticor* is that an entire industry can be "regulated" in the generic sense and, concurrently, specific subsections of that industry or practices within it can at the same time be left unregulated. *Ticor* specifically mandates that, despite any overarching regulation of an industry, it is the *specific conduct which is challenged by the plaintiff under the antitrust laws* that must be specifically regulated by the state to the extent that the state (1) not only condones the specific challenged conduct, but (2) actively supervises it, as well. The Fifth Circuit's idea that, because

Respondent's monopoly telephone rates are approved by the PUC, *ergo* the first prong of *Midcal* is met, does not comport with *Ticor's* requirement that the focus of the state action immunity inquiry is not on the industry or on some regulation of it in general but rather on the specific conduct challenged in the Petitioner's suit.

The trial court first is required to identify the "challenged anticompetitive conduct." The inquiry under the first prong of *Midcal* is whether there is a clearly articulated stated policy. The inquiry under the second prong of the *Midcal* test is whether the state "actively supervised" the challenged conduct. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) [*Midcal*]; *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988) [*Patrick*].

It is self-evident that the "challenged restraint" [*Midcal*, at 105] or the "challenged anticompetitive conduct" [*Patrick*, at 1663], particularly in a Rule 12(b)(6) motion to dismiss, must be taken from the complaint filed by the plaintiff, the Petitioner here.

Without doubt, the "challenged conduct," the "challenged restraint," or the "challenged anticompetitive conduct" is both clear and obvious — Respondent's heavy-handed threat on June 8, 1989 to cut off Petitioner's telephone lines and put Petitioner out of business. (See the Respondent's termination notice, Appendix P).

However, the circuit court ignored Respondent's conduct, persistently referring to "the *nature* of the Texas regulatory *scheme*" or "the Texas system [which] authorizes the state to control...*rates*" as determinative of the issue of state action immunity. *DFW Metro Line*, 988 F.2d at 602, 607 (emphasis added). Based upon that inexplicable misunderstanding of state action immunity, the court concluded that "[t]he only question for our review is whether the state sufficiently supervises the challenged conduct—here, the *ratemaking and rate application process*." *DFW Metro Line*, 988 F.2d at 605. (emphasis added).

There is no case authority which suggests that the court below has any authority to rewrite the Petitioner's complaint and concoct a new and different "challenged anticompetitive conduct."

After looking at the complaint to identify the challenged conduct, the court has the duty to examine the text and the intent of the statutes or agency rules which declare the state's policy, in order to determine whether *that* specific conduct challenged in the complaint is conduct which is "clearly articulated and affirmatively expressed as state policy." *Midcal*, at 105. If so, the first prong of the *Midcal* test is satisfied.

Yet, in none of the circuit court's three opinions is there any attempt to read, discuss, analyze or apply the PURA, its legislative intent or the PUC's interpretations of it in an effort to apply the first prong of the *Midcal* test. From the beginning, PURA § 89 has directed that the "Act shall be construed to apply so as not to conflict with any authority of the United States." That is consistent with the federal divestiture court's application of the Supremacy Clause to hold that the court's enforcement of the Sherman Act was not subject to the permission or approval of state utility regulatory commissions.[6]

Notably, from the Act's inception, § 47 of PURA has provided:

> No public utility may discriminate against any person or corporation that sells or leases equipment or performs services in competition with the public utility, nor may any public utility engage in any other practice that tends to restrict or impair such competition.

Clearly, § 47 is compatible with the federal antitrust laws. Indeed, in the purpose clause of the PURA, at § 2, the Legislature made it clear that the preferred "normal forces of competition" do not operate in the areas served by monopoly utility companies; and, to attempt to emulate competitive forces "which operate to regulate prices in a free enterprise society," the Act's purpose is to establish a regulatory system to regulate public utilities in those monopoly areas. Subsequent amendments and court and PUC interpretations of PURA established that the regulatory function of the PUC is to be adjusted and modified *as competition develops* in the varied

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[6] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 157-159.

telecommunications markets, *i.e.*, the PUC's regulatory power is to bear only upon the operations of public utilities in *monopoly* markets.[7]

PURA Sections 3(c)(2); 18(a), (c), (e-h), and (k-r); 45; and 100, when read with §§ 2, 47, and 89 already discussed, represent an overriding legislative policy aimed at accomplishing two parallel goals:

(1) To regulate monopoly electric and telephone utilities to protect consumers from excessive prices and poor or discriminatory services; and

(2) To permit "new telecommunications enterprises" to compete openly and fairly in *competitive* markets—to provide "...equal opportunity to all telecommunications utilities in a competitive marketplace." PURA § 18(a).

The Texas Supreme Court expressly held that sections 45 and 47 of the PURA "apply to only the public utility itself and not to the Commission." *Public Utility Commission of Texas v. AT&T Communications, Inc.*, 777 S.W.2d 363, 367 (Tex. 1989). Clearly, then the policy of the State is to protect competitors, and competitors as customers of a public utility, from both discriminatory and anti-competitive conduct of a public utility.

Section 18(a) of PURA declares the Legislature's intention to further strengthen policies to encourage competition in telecommunications; expressly recognizing the impacts of both technology and "federal judicial and administrative actions"; and finding that the telecommunications industry "has become and will continue to be in many and growing areas a competitive industry which does

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[7] As the PUC said in 1984:

"The Commission is of the opinion that where new technologies arise which can thrive only in an unregulated environment, *then regulation should give way* to technology rather than vice-versa...Simply put, the age of technology and competition is upon us and regulation should acknowledge this fact." *Texas PUC Docket 5827, Final Order*, November 21, 1984, *aff'd, Southwestern Bell Telephone Co. v. PUC of Texas*, 735 S.W.2d 663 (Tex.App.—Austin 1987, no writ) (emphasis added).

not lend itself to traditional public utility regulatory rules, policies and principles." See, also, §§ 18(e) and (g), establishing policies preventing anticompetitive practices by telecommunication's utilities.

Thus, the Texas legislature, in six different sessions of the Legislature from 1975 through 1991, adopted and amended the PURA in a manner to clearly articulate a pervasive and expanding policy promoting both the development and the protection of competition in telecommunications.

Those policies were discussed by the Texas Court of Appeals in *Amtel Communications, Inc. v. PUC*, 687 S.W.2d 95 (Tex. App. 3 Dist. 1985):

> First, PURA requires that the Commission implement a public policy that *monopoly power* of a public utility shall be held only under State license and *exercised under State regulatory control.* The statute requires, *concurrently*, that the agency implement a contrary *public policy in favor of competition.* Second, the Commission must under PURA implement a public policy against discrimination in utility services while, in some instances and in some degree, the agency may implement a policy of discrimination based upon the public interest.

687 S.W.2d at 99 (emphasis added).

First, the Court construed the PURA as a statement of state policy to the effect that a monopoly public utility can *exercise* its monopoly power *only under State regulatory control*, that is, a monopoly utility is *not to act as a monopoly* except under the *regulatory* control of the Texas PUC. Then the Court construed the PURA as establishing a "concurrent" public policy favoring and protecting competition in the telecommunications industry. That latter policy of the State has been emphasized and expanded in the 1985 and 1987 amendments of PURA, *supra.*

After analyzing the sections of the PURA dealing with the regulation of the *proper exercise* of monopoly power by a utility, the *Amtel* court then stated;

> On the other hand, PURA contains other provisions that are distinctly "antitrust" in nature and reflect a definite public policy *in favor of competition* as a regulating or controlling force applicable to public utilities. In these particular instances, it is plain that the PURA *does not insulate a public utility from the forces of competition and, indeed, prohibits anticompetitive practices by the utility*. [citing Section 18(a) and Section 47 of the Act]. 687 S.W.2d at 100 (emphasis in original and added).

Yet, the Court below did exactly the reverse by deciding to "insulate a public utility from the forces of competition" and by immunizing "anticompetitive practices by the utility."

Respondent's local telephone lines are the only telephone lines which *all* competing service companies [e.g., long distance companies, paging companies, mobile telephone companies and metro service companies] must use; they are the "bottleneck" facilities of antitrust jurisprudence.

This Court held in *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), that Otter Tail Power Company could not use its monopoly power to foreclose the competition of other electrical systems. That decision articulated what has come to be known as the "essential facilities doctrine," namely, that a business which controls a facility that cannot reasonably be duplicated and to which access is necessary in order for others to compete, has an obligation to provide its competitors with access to the facility. When applied to the case here, *Otter Tail* mandates that the Petitioner be allowed access to Respondent's telephone lines. *See also MCI Communications Corporation v. American Telephone and Telegraph Company*, 708 F.2d 1081 (7th Cir. 1983), *cert. denied*, 104 S.Ct. 234 (1983).

In reviewing the applicability of the state action immunity to a state statute allowing a liquor price fixing system, this Court first noted a threshold question before proceeding to apply either prong of the *Midcal* test:

> The 'threshold question,' in this case as in *Midcal*, is whether the State's pricing system is inconsistent with the antitrust laws.

324 *Liquor Corp v. Duffy*, 479 U.S. 335, 341 (1987), citing *Midcal*, 445 U.S. at 102 n.7.

Here, the Texas PURA is *not* inconsistent with the antitrust laws of the United States. Had the court below analyzed the PURA at all, it should have readily concluded that the PURA is not a policy statement candidate for meeting the first prong of the *Midcal* test.

3. Ignoring *Ticor* and this Court's remand order, the circuit court erred in failing to apply the second prong of *Midcal* to Respondent's challenged anticompetitive conduct by reviewing the facts in the record or by remanding the fact issue to the district court.

Under *Midcal's* second prong, a court must find that the policy was "actively supervised by the State itself." *Ticor*, 112 S.Ct. at 2176 (quoting *Midcal*, 445 U.S. at 105). This Court went to great lengths to clarify the meaning of this requirement:

> ...*Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is *both intended* by the State *and implemented in its specific details. Actual state involvement*, not deference to private [conduct] under the general auspices of state law, is the precondition for immunity from federal law.

Ticor, 112 S.Ct. at 2176-2177. Only upon a showing of "active supervision in fact" of what is otherwise private conduct of will state action immunity arise. *Ticor* 112 S.Ct. at 2179. The Court emphasized this requirement:

> ...we decline to formulate a rule that would lead to a finding of active supervision where *in fact* there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the *clear absence of state supervision.*

Ticor, 112 S.Ct. at 2180. This Court's mandate is clear. Only upon evidence that the specific challenged conduct of Respondent is actively supervised, *in fact*, does state action immunity arise.

There is no such evidence in the Record. Respondent did not even attempt to rely on the Record, and the circuit court made not a single reference to any evidence in the Record.

The requirements clarified in *Ticor* are designed to further the purpose of the state action doctrine:

> Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the *details* of the [the challenged conduct] have been established as a product of *deliberate state intervention*, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The *question is not how well state regulation works but whether the anticompetitive scheme [conduct] is the State's own.*

Ticor, 112 S.Ct. at 2177.

In contrast to the meaningless exercise engaged in by the court below, a fair paraphrase of the above statement in *Ticor* would properly state the issue before the court below:

> The question is not how well state regulation of utility ratemaking works but whether Respondent's anticompetitive scheme to threaten to disconnect the telephone lines of a competitor is the state's own.

The PUC's supervision of a monopoly public utility's rates in public ratemaking hearings is far removed from that kind of active review and approval or disapproval of a private party's challenged anticompetitive conduct this Court spoke of in *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985) and *Patrick v. Burget*, 108 S.Ct. 1658, 1663 (1988). In *Patrick*, quoting from *Hallie*, this Court clearly articulated the standard to be applied to the "active supervision" requirement of *Midcal*:

> "The active supervision requirement stems from the recognition that *"[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather that the governmental interests of the State.*170 *Hallie v. Eau Claire,* 471 U.S. 34, 47, 105, S.Ct., 1713, 1720, 85 L.Ed.2d 24 (1985); *See Id.,* 45,105 S.Ct., at 1719-1720 *("a private party ...may be presumed to be acting primarily on his own or its own behalf").* The requirement is designed to ensure that the state action doctrine will shelter *only* the *particular* anticompetitive acts of private parties that, in the judgment of the State, *actually furthers state regulatory policies. Id.,* at 46-47, 105 S.Ct. at 1720. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct ...The active supervision prong of the *Midcal* test requires that State officials *have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with State policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes State policy, rather that merely the party's individual interests.*170

Patrick, 108 S.Ct. at 1653 (emphasis added).

Further, in *Ticor,* this Court held that its opinion in *Southern Motor Carriers* — heavily relied upon by both the Circuit Court below and Respondent at every stage of these appeals — should *not* be regarded as guidance on the active supervision, second prong of the *Midcal* test, because this Court in *Southern Motor Carriers:*

> ...undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met.

Ticor, Id., at 2179.

The Respondent and the court below did not address how it is that Respondent's challenged conduct furthers any governmental interest of the State of Texas in any "clearly articulated and

affirmatively-expressed State policy." Nor did the court below address or find any factual evidence that the State of Texas had any mechanism to actually exercise any power to review "particular anticompetitive acts of private parties and disapprove those that fail to accord with State policy." Neither the Respondent nor the court below cite any acts or policies of the Texas Legislature or any reviews, investigations or proceedings ever initiated by the PUC to review or approve any anticompetitive conduct by Respondent .

Rather, the circuit court embarked upon an irrelevant, general discussion of the PUC's *ratemaking* activities and its general authority which "extends to reviewing rules, regulations, and practices of a utility...[providing] a forum for complaints from any affected person." The court below admits that "this *potential* for supervision does *not satisfy* the second prong of the *Midcal* test." But, then, the court proceeds to find from its "review of the record" that the second prong is satisfied because, in its *brief*, Respondent refers to several PUC *ratemaking* cases in the mid- and late 1980's. (Appendix A12).

Obviously, the court below entirely missed the central point of *Ticor* — that the Court must find from facts in the Record — not from Respondent's brief reciting general and unrelated ratemaking proceedings — that "state officials have undertaken the necessary steps to determine the *specifics* of the [challenged anticompetitive conduct]" so that it can be determined:

> whether the State has exercised sufficient independent judgment and control so that the details of the [challenged anticompetitive conduct] have been established as a product of deliberate state intervention...but whether the anticompetitive scheme is the State's own.

Ticor, at 2177.

Under the second prong, the sole inquiry is whether, in fact, the state actively supervised the Respondent's challenged anticompetitive conduct at the time the Petitioner filed its lawsuit (July, 1989). Clearly, that determination involves issues of fact — did the PUC know that Respondent Southwestern Bell had threatened

to cut off Petitioner's lines? Did Respondent inform the PUC of a policy or practice of doing so? Had PUC employees looked into the matter, conducted a formal or informal inquiry, and either approved or disapproved Respondent's threat to terminate the telephone lines of a customer who also is a competitor? Did Respondent introduce into the Record any evidence from PUC Commissioners, technical staff or employees regarding any inquiry about or approval of Respondent's proposed action under its June 8, 1989 "Termination Notice" to Petitioner, to terminate Petitioner's telephone service because it constituted a "resale" of Respondent's own competitive service? (Appendix P). Did Respondent introduce into the Record any evidence of any "resale" tariff; or any submission of such a tariff to the PUC for approval; or was any such tariff approved by the PUC; or is there any tariff language even preventing "resale" or authorizing disconnection?

A page-by-page examination of the entire Record results in a "No" answer to each of the above questions. Respondent's off-the-wall claim of state action immunity is found only in a portion of its brief, as pure conclusion and contention, without any reference to the Record at all — precisely because there is no evidence in the Record of active state supervision of Respondent's crude and arbitrary conduct here.

Moreover, such a factual analysis of the Record, required by *Ticor*, precludes any granting of Respondent's Rule 12(b)(6) motion to dismiss, which can address only the sufficiency of the complaint as a matter of law, after taking the complaint's allegations as true. *Conley v. Gibson, supra.*

Clearly, on remand the circuit court should have:

(1) Identified the challenged conduct by reading Petitioner's complaint — the Respondent's attempt to exercise its monopoly power over "bottleneck" telephone lines to put a competitor out of business by terminating Petitioner's telephone lines essential to that business;

(2) Analyzed the text, intent and interpretation of the Texas PURA, to be able to apply the first prong of *Midcal*; and

(3) Analyzed the facts in the Record to determine if Respondent had introduced any or sufficient, probative evidence of the PUC's active supervision, in fact, of the challenged conduct in (1) above, and any evidence whether the PUC approved that conduct as consistent with a clearly articulated policy of the state, if found in (2) above.

An alternative for step (3) would have been for the circuit court to have taken steps (1) and (2) above and then reverse the district court's judgment granting Respondent's motion to dismiss, and remand the case to the district court with instructions either to (a) entertain a party's Rule 56 motion for summary judgment on the second prong test or (b) reopen the Record for the admission of specific evidence on the *Ticor* in fact standard for active state supervision of Respondent's conduct.

Inexplicably, the circuit court declined to take any of the foregoing steps to accomplish this Court's goal on remand.

Rather, instead of step (1), the circuit court resurrected its old, misguided obsession with "private state-regulated ratemaking" (footnote 6 of the Circuit Court's first *per curiam* opinion (Appendix G4)) in order to divert the entire direction of all three inquiries in (1), (2) and (3) above. Yet, the complaint does not attack either the existence or lawfulness of *any* Southwestern Bell rates. Even Respondent Southwestern Bell, in its Respondent's Brief in Opposition, filed with this Court on March 4, 1992 (Case No. 91-1269), made *no claim* that its rates were at issue here. Rather, Respondent "Southwestern Bell sought to terminate Petitioner's *misuse and resale of its local exchange services...*" (*Id.*, p.2) Had Petitioner attacked Respondent's *rates*, under the doctrine of primary jurisdiction then the original jurisdiction was in the PUC, not the antitrust court. But, in its first *per curiam* order of May 29, 1990, the circuit court expressly rejected Southwestern Bell's claim that the federal courts did not have jurisdiction of this case and that the PUC had exclusive original jurisdiction:

> Bell's argument begs the question. DFW's complaint alleges a violation of the federal antitrust laws, an allegation that

> brings the case within federal jurisdiction...Whether Bell is thus [state action] immunized is a federal question to be litigated in federal court.

(Appendix G4).

The court below refused to follow the necessary steps to correctly apply the standards of *Ticor* and *Midcal*, preferring to simply declare that the conduct which Petitioner's antitrust complaint challenged is "the application of the *established rates*." *DFW Metro*, at 605. (emphasis added). The court below mischaracterized the challenged conduct this way:

> The real issue in this appeal, then, is the second prong of the *Midcal* Test — whether the state of Texas *actively supervises the regulatory conduct* in question...
>
> * * *
>
> The only question for our review is whether the state sufficiently supervises *the challenged conduct — here, the ratemaking and rate application process.*

Id., at 605. (emphasis added).

Of course, Petitioner did not challenge the "regulatory conduct" of anyone; did not challenge any "application of rates"; and, clearly, did not challenge "the ratemaking process." The circuit court's entire approach to the application of *Ticor* was wrong.

4. The decision below conflicts with (A) decisions of this Court in applying the state action doctrine to private anticompetitive conduct in a competitive relevant market, and (B) decisions of other courts of appeal rejecting antitrust immunity claimed under the filed tariff doctrine.

A. Regarding the first prong of the *Midcal* test, this Court's decision in *Southern Motor Carriers*, should not have been relied upon for the decision below for another , significant reason-this Court's emphasis on the *relevant market*:

> ...in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indi-

> cated no intention to displace competition in the relevant market. 421 U.S., at 584-585, 96 S.Ct., at 3114, 3115.

Southern Motor Carriers, 105, S.Ct. at 1731.

Petitioner submits that this Court's decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) is applicable here, but ignored by the court below. In *Cantor* this Court rejected Detroit Edison's claims, which were virtually identical to Respondent's claims below. *See, Cantor*, 428 U.S. at 595-599. For a discussion of *Cantor*, see Petitioner's Petition For Writ of Certiorari, No. 91-1269, filed January 21, 1992, at pp. 18-21. *Ticor* expressly cited *Cantor* with approval. *Ticor* (Appendix C17).

Using regulated customer tariffs in an unregulated area as an excuse to force out a competitor is private activity in a competitive market , and is unlawful.

Moreover, the court below failed to perceive the importance of applying the state action doctrine in a manner which will not impede the state's freedom of action:

> These States [those filing *amici curiae* briefs] *deny* that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the *amici* submission.
>
> ***
>
> ...the state-action immunity is *disfavored, much as are repeals by implication. Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399 (1978). By *adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws*, we *increase the States' regulatory flexibility... Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends.* For States which do choose to displace the free market with regulation, our insistence on *real compliance* with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Ticor, (Appendix C18-C19, emphasis added).

Thus, *Ticor* mandated that the party claiming immunity - here, Respondent Bell:

> "...must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting shceme. *The mere potential for state supervision is not an adequate substitute for a decision by the State*".

Ticor, (Appendix C18-19, emphasis added).

By allowing Defendant Bell to write and file is customer rates with the PUC, or by the PUC approving those rates for Bell's customers, the State of Texas did not give Bell immunity for its misconduct towards its competitors, nor did Texas, in any manner, declare that misconduct to be lawful.

B. The court below impliedly adopted its version of the filed tariff doctrine in its erroneous application of the state action exemption.

In *Essential Communications v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3rd Cir. 1979), the court analyzed the limitations on the filed tariff doctrine. As that court pointed out, the tariff scheme in *both* federal and state regulatory systems is:

> ...designed essentially for the *protection of telephone users* in a rather limited way from discrimination in rates or service and from excess charges...
>
> ***
>
> *However, the filed tariff rule has little or nothing to do with AT&T's duties under the antitrust laws toward its competitors* in the equipment supply business; *competitors are not intended beneficiaries of that rule of public utility regulation.* This distinction was recognized over 50 years ago by Justice Brandeis in the leading case of *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed 183 (1922).
>
> ***

> There is no policy conflict, actual or potential, therefore, between the section 4 Clayton Act remedy and the antidiscrimination purposes of the filed tariff rule."

610 F.2d at 1120-22 (emphasis added).

The court rejected AT&T's claim of implied immunity from the antitrust laws, merely because AT&T's rates and tariffs were filed with or approved by the FCC. *Accord, United States v. R.C.A.*, 358 U.S. 334, 339-46; *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 597 n. 36, 96 S. Ct. 3110 (1976); *MCI Communications Corp. v. At&T*, 708 F.2d 1081, 1101-05 (7th Cir. 1983), *cert. denied* 104 S.Ct. 785 (1983).

The court then rejected the filed tariff doctrine, reversing the district court's dismissal of the plaintiff's Section 16 injunction action, holding that: "...the complaint should not have been dismissed on the ground that the FCC tariffs made the defendants' activities exempt from antitrust scrutiny." 610 F.2d at 1124. Then, the court also rejected At&T's claim to immunity under the *Parker v. Brown* state action doctrine, based on AT&T's claim that its actions also were permitted by *state tariff filings* (exactly as Respondent contended below):

> There are several difficulties with this argument. The first is that the typical state regulatory scheme is essentially no different than that of the 1934 Act. It permits carriers to initiate tariffs, requires them to adhere strictly thereto in dealing with their customers, and permits their revision, in the interest of the customers, by a state regulatory agency. The analysis which we made with respect to any conflict between federal antitrust law and federal utility regulation in Part II is equally applicable here. A second, and we think insurmountable objection, is the holding in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed. 2d 1141 (1976) *that the provisions of utility initiated tariff filings do not furnish a predicate for a Parker v. Brown exemption from antitrust claims by competitors* injured as a result of compliance with the tariffs. The court's analysis in *Cantor* is entirely consis-

> tent with that which we made in Part II [the implied immunity issue above].

Id. at 1125-26 (emphasis added).

In *City of Kirkwood v. Union Electric Co.*, 671 F.2d 1173 (8th Cir. 1982), the court also rejected the filed rate doctrine in a price-squeeze antitrust claim against a regulated electric utility company, even though the electric company was subject to pervasive regulatory schemes of both federal (Federal Energy Regulatory Commission) and state (Missouri Public Service Commission) regulatory agencies, and even though the price squeeze complained of by the plaintiff *arose from the federal and state rate-making tariffs* filed by the electric company.

Citing *Essential, supra*, the court held that the filed-rate doctrine is to protect customers, not competitors, stating:

> *A rule formulated to ensure uniformity of rates as between customers should not give unfair advantage to a utility in its dealings with competitors.*

Id. at 1179 (emphasis added).

The foregoing analysis directly applies to this case. Petitioner has not challenged any rate *or* the reasonableness of any rate; and neither the court below nor Respondent claim otherwise.

5. The court below erred in treating the district court's dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6) as a summary judgment proceeding under Fed. R. Civ. P. 56 since: (A) there was no "stipulation"; (B) no matters or evidence outside the pleadings were considered by the district court in its motion to dismiss decision; (C) Petitioner was not afforded the procedural safeguards of Rule 56; and (D) the circuit court was required to review the factual Record and did not.

A. The court below claimed that the parties "stipulated at oral argument" that, "in effect," that court could review the case "as though" it was an appeal from the district court's grant or denial

of a summary judgment motion. The statement is untrue.[8] There is nothing in the Record which remotely suggests there was any summary judgment activity by either party in the district court or any "stipulation" in the court below.

B In granting Respondent's R.12(b)(6) motion to dismiss in its February 27, 1991 order (Appendix E), the district court did not indicate it was treating the motion as a motion for summary judgment. The Fifth Circuit recently stated and held "[O]nly if it appears that the district court did rely on matters outside the pleadings should an appellate court treat the dismissal as a summary judgment." *Fernandez-Montes v. Allied Pilots Association*, 987 F.2d 278, 283 (5th Cir. 1993), citing *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 57 n. 3 (5th Cir. 1979).

Here, there is no indication in the Record whatsoever that the district court, in dismissing Petitioner's complaint for failure to state a claim, considered any matters outside the pleadings. In fact, the district court in its February 27, 1991 Memorandum Order and Final Judgment (Appendix E) relied only upon its previous determination, in its August 30, 1989 Memorandum Order denying a preliminary injunction, that the two-pronged test of this Court's *Midcal* decision was satisfied by the Texas PURA (Appendix K); indeed, the district court entirely ignored the Record in applying the second prong.

C. Further, it is apparent in the Record that the court below erred in treating the district court's February 27, 1991 dismissal order as an order granting a non-existent motion for summary judgment *by Respondent* ("A movant such as Bell....", Appendix A7), since Petitioner *was never accorded any of the procedural safeguards of Rule 56*, which the court below, in other cases, has protected. *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1284 (5th Cir. 1990). This includes, at the very least, ten days notice and an opportunity to respond. *Fernandez-Montes v. Allied Pilots*

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[8] To show that the statement of the circuit court is untrue, Petitioner requested a transcript of the oral argument but the request was refused. No "stipulation" was made. See Appendices N and O.

Association, 987 F.2d 278, 283 (5th Cir. 1993). Thus, an appellate court may review a lower court's decision as one for summary judgment *only where "the opposing party has been afforded an opportunity to respond."* *Washington*, 901 F.2d at 1284. Such procedural safeguards are especially important where, as here, the burden would have shifted to the nonmovant, Petitioner, to establish a genuine issue of material fact and that the movant is not entitled to judgment as a matter of law. *See, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242(1986). Here, there is no indication in the docket sheet in the district court or in the Record as a whole that Petitioner was afforded any nature or opportunity to respond.

D. Further, once an appellate court decides to treat a dismissal order as one for summary judgment, then it must review the fact Record *de novo* and decide for itself that there are or are not genuine issues of material fact *and* that the movevant is entitled to judgment as a matter of law. *See, e.g., Wilson v. U.S. Dept. of Agriculture*, 991 F.2d 1211, 1214 (5th Cir. 1993). Here, there was an *absence* of Record evidence to show any, in fact, active state supervision of Respondent's anticompetitive conduct. Even if the court below were authorized to act on a summary judgment, it should have made Petitioner the movant.

Finally, this Court should reject the claim of the court below that Petitioner's contention that there was no in fact, active state suppression was "ludicrous, almost to the point of frivolity" — because Petitioner and Respondent "filed a joint pleading" in the PUC to adjudicate "the very same issues" as in this case. (Appendix A13). The statement is untrue and known by the court below to be untrue. See, R.44, pp. 548, 553-554, 575, 577; and Appendix N and Attachment 1. The complaint proceeding at the PUC, directly caused by Respondent's threat, involved entirely different issues and the PUC has no authority to award damages or injunctive relief, as the panel below was reminded of again in oral argument.

CONCLUSION

The decision below does not at all comply with or apply the standards of *Ticor* and *Midcal*. The court below departed so far from the accepted and permissible course of judicial proceedings that this Court's power of supervision should be exercised to enforce its earlier remand order. Petitioner respectfully prays that the Court issue a writ of certiorari to review the judgement of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

DFW Metroline Services
(now known as U.S. Metroline Services, Inc.),
Plaintiff-Appellant,

v.

Southwestern Bell Telephone Corporation,
Defendant-Appellee.

No. 91-1364

April 19, 1993

Antitrust claims were asserted against regional telephone company by competing telephone service, after regional telephone company threatened to terminate competing telephone service's use of telephone lines if competing telephone service did not pay appropriate higher rates for its use of lines to provide flat rate telephone service between cities. After denial of injunctive relief was affirmed, 901 F.2d 1267, the United States District Court for the Northern District of Texas, A. Joe Fish, J., dismissed suit, concluding that regional telephone company was entitled to state action immunity, and competing telephone service appealed. The Court of Appeals, 947 F.2d 1486, affirmed. Matter was remanded for further consideration, 112 S.Ct. 2987. The Court of Appeals, Wiener, Circuit Judge, held that Texas provided sufficient supervision of anticompetitive conduct for original telephone company to be entitled to state action immunity.

Affirmed.

1. **Federal Courts 766**

On appeal from grant or denial of summary judgment, appellate court reviews record under same standards which guided district court.

2. **Federal Courts 776, 802**

In determining whether summary judgment was proper, reviewing court views all fact questions in light most favorable to nonmovant, but reviews questions of law de novo.

3. **Federal Civil Procedure 2484**

Movant seeking summary judgment is entitled to judgment as matter of law in antitrust matter if it demonstrates that it is entitled to claim immunization from liability on grounds alleged.

4. **Monopolies 12(16)**

Private party conduct pursuant to regulatory program shares "state action" immunity from antitrust liability only if challenged restraint is clearly articulated and affirmatively expressed as state policy and state actively supervises any anticompetitive conduct. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

5. **Monopolies 12(16)**

Conduct of regional telephone company being challenged by competing telephone service was applying higher rates to competing service upon discovering that service was using regional company's telephone lines to provide flat rate telephone service between cities, rather than threatening to cut off competing service's telephone lines if it did not pay higher rates, for purposes of determining whether regional company was entitled to "state action" immunity, irrespective of possible future consequences of regional company's actions or of possibility that regional company harbored some secret desire to rid itself of competitor. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

6. **Monopolies 12(16)**

Texas Public Utilities Commission (PUC), acting under authority of Texas Public Utility Regulatory Act (PURA), provided sufficient state supervision of regional telephone company's anticompetitive conduct for regional company to be entitled to state action immunity from antitrust claims of competing telephone service arising from regional company's imposition of applicable high rates on competing service for competing service's flat rate

telephone service between cities; Texas system authorized state, through PUC, to control initial establishment of rates, rules, and regulations, and allowed complaining party to challenge application of particular rate through PUC, and more importantly the PUC acted under that grant of authority with sufficient involvement. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Vernon's Ann.Texas Civ.St. Art. 1446c.

Appeal from the United States District Court for the Northern District of Texas. Before REAVELY, KING, and WIENER, Circuit Judges.

WIENER, Circuit Judge.

In this anti-trust case, Plaintiff-Appellant DFW Metro Line Services, now known as U.S. Metro Line Services, Inc. (Metro), appeals the dismissal of its suit against Defendant-Appellee Southwestern Bell Telephone Corporation (Bell), claiming that the district court erred in its determination that Bell was protected from anti-trust liability under the state action doctrine. Our plenary review of the record convinces us to agree with the district court's conclusion that the nature of the Texas regulatory scheme is such that Bell is immunized from suit under the state action doctrine. We therefore affirm that court's dismissal of Metro's complaint.

I

FACTS

Metro offers a flat rate telephone service between Dallas and Fort Worth called metro service or EMS. To provide this service, Metro must use Bell's telephone lines. At the time the dispute originated in 1982, Bell was leasing the lines to Metro, a licensed radio common carrier, at Radio Common Carrier-Direct Inward Dialing (RCC-DID) rates for the express purpose of providing one-way paging services. Without advising Bell, Metro later expanded its use of Bell's phone lines by instituting EMS service, thereby competing directly with Bell. When Bell discovered that Metro had expanded its services but was still paying the lower RCC-DID rates, Bell informed Metro that it would have to pay the

substantially higher, appropriate rate or the lease would be terminated. According to Bell, the higher rates were required by the Public Utility Commission (PUC)—which determines the rates to be charged based in part on the use to be made of the phone line—under authority of the Public Utility Regulatory Act (PURA).[1]

II

PROCEEDINGS

Metro originally brought suit seeking a temporary restraining order (TRO) and preliminary and permanent injunctions preventing Bell from terminating telephone service to Metro, and asserting an anti-trust claim. The district court granted the TRO, and the parties submitted briefs on the issues. Based on these briefs, the district court lifted the TRO and denied Metro's application for preliminary injunction. In its decision, the district court concluded that Metro had little likelihood of success on the merits because Bell had demonstrated that it was entitled to immunity from anti-trust liability by meeting the requirements of the two-prong test set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*[2] (the *Midcal* test). The district court concluded that the active supervision requirement of the *Midcal* test was satisfied by PURA, which vested the PUC with power to ensure compliance with PURA, fixing and regulating rates, determining the classifications of customers and services, and determining the applicability of rates.

We affirmed the district court in *DFW Metro Line Services v. Southwestern Bell Tel. Co. (Metro I)*.[3] In addition to affirming the

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[1] TEX.REV.CIV.STAT.ANN. ART. 1446c (Vernon Supp.1989).

[2] 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). As is discussed in more detail below, private conduct is immunized from anti-trust liability if the action meets the two-prong *Midcal* test, which requires the party seeking immunity to show that (1) the conduct is regulated by the state; and (2) the state actively supervises the regulated activity.

[3] 901 F.2d 1267 (5th Cir.), *reh'g denied*, 908 F.2d 971, *cert. denied*, 498 U.S. 985, 111 S.Ct. 519, 112 L.Ed.2d 530 (1990).

denial of a permanent injunction, the panel opinion in *Metro I* stated:

> As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in [Metro's] complaint under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as applied to private state-regulated ratemaking in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). Southwestern Bell clearly meets the two-prong test set out in *California Retail [Liquor] Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case.[4]

Metro's petition for certiorari proved unsuccessful and the case was returned to the district court.

At that point in the proceedings, the district court addressed the merits of the case and dismissed Metro's anti-trust action under Rule 12(b)(6). Metro appealed, and we affirmed the dismissal based on *Metro I* and the law of the case doctrine.[5] On writ of certiorari, ___ U.S. ___, 112 S.Ct. 2987, 120 L.Ed.2d 2987 (1992), the Supreme Court vacated and remanded *Metro II* for further consideration in light of *Federal Trade Commission v. Ticor Title Insurance Co.*[6] It is that case which we consider on the Court's remand today.

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[4] *Id.* at 1269 n. 6.

[5] *DFW Metro Line Services v. Southwestern Bell Tel. Co.*, 947 F.2d 1486 (5th Cir. 1991) (unpublished per curiam opinion) (*Metro II*).

[6] 504 U.S. ___, 112 S.Ct. 2169, 119 L.Ed. 2d 410 (1992).

III

ANALYSIS

A. *Standard of Review*

Although the district court dismissed Metro's claim for failure to state a cause of action under Rule 12(b)(6), it comes to us on appeal with an extensive record, developed in detail during the proceedings for injunctive relief. Given the status of the record and the extensive procedural history of this case, both parties stipulated at oral argument to this court that, in effect, we review the case as though it were before us on appeal from the grant or denial of a summary judgment motion.

[1-3] Accordingly, we review the record "under the same standards which guided the district court."[7] These standards, set forth in the Supreme Court trilogy of *Anderson v. Liberty Lobby Inc.*,[8] *Celotex Corp. v. Catrett*,[9] and *Matsushita Electrical Industrial Co. v. Zenith*,[10] provide that summary judgment is appropriate when no issue of material fact exists and the movant is entitled to judgment as a matter of law.[11] In determining whether summary judgment was proper, all fact questions are viewed in the light most favorable to the nonmovant. Questions of law, however, are reviewed de novo.[12] A movant such as Bell is entitled to judgment as a matter of law if it demonstrates that it is entitled to claim immunization from liability on the grounds alleged.

> Given the procedural history of this case, our de novo review is limited somewhat by the law of the case doctrine, which provides:

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7 *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988).

8 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

9 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

10 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

11 *Celotex*, 477 U.S. at 323-25, 106 S.Ct. at 2552-54.

12 *Walker*, 853 F.2d at 358.

> The decision of a legal issue by an appellate court establishes the "law of the case" an must be followed in all subsequent proceedings in the same case at both the trial and appellate levels unless the evidence at a subsequent trial was substantially different, the controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.[13]

As the Supreme Court's order of remand directed us to consider this case in light of *Ticor*, and a fair reading of that case discloses that the Court considered only the second prong of the *Midcal* test, it follows that the prior decision of this court regarding the first prong remains undisturbed. As such,the law of the case doctrine requires that we follow the prior panel's determination that Bell has met the first prong of the *Midcal* test, i.e., that Texas has expressly authorized the regulation. That leaves as the only issue for our review today whether Bell has satisfied the second prong of the *Midcal* test, as clarified in *Ticor*, which requires that the state actively supervise the regulated activity.

B. *Anti-Trust Law*

The Sherman Anti-Trust Act (the Act)[14] makes unlawful "[e]very contract, combination ... or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations...."[15] The act also makes it unlawful to "monopolize, or attempt to monopolize, or combine to conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations...."[16] In the seminal case of *Parker v. Brown*,[17] the Supreme Court, addressing

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[13] *Reid v. Rolling Fork Pub. Util. Dist.*, 979 F.2d 1084, 1086 (5th Cir.1992) (quoting *Schexnider v. McDermott Int'l Inc.*, 868 F.2d 71, 718-19 (5th Cir. 1989)).

[14] 15 U.S. C. §§ 1-7.

[15] *Id* § 1.

[16] *Id.* § 2.

[17] 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

whether a state marketing program violated the Act, held that "in a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Therefore, "in view of the [Act's] words and history, it must be taken to be a prohibition of individual and not state action."[18]

[4] Thus,from *Parker* originated the "state action doctrine," which confers antitrust immunity for state regulatory programs. The Court subsequently made clear in *Midcal*[19] that private party conduct pursuant to a regulatory program shares this immunity only if the conduct meets both prongs of a two-prong test, thenceforth called the "*Midcal* test." This test requires that: (1) the challenged restraint be clearly articulated and affirmatively expressed as state policy; and (2) the state actively supervise any anticompetitive conduct.[20]

1. Clearly Articulated State Policy

The district court held, and Bell agrees, that this prong is satisfied by PURA, which provides:

> This Act is enacted to protect the public interest inherent in the rates and services of public utilities. The legislature find that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in the free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies with the objective that such regulation shall operate as a substitute for such competition. The purpose of this Act is to establish a

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[18] *Id.* at 352, 63 S.Ct. at 314.

[19] 445 U.S. at 97, 100 S.Ct. at 937.

[20] *Id.* at 105, 100 S.Ct. at 943.

> comprehensive regulatory system which is adequate to the task of regulating public utilities as defined by this Act, to assure rates, operations, and services which are just and reasonable to the consumers and to the utilities.[21]

Again, we have previously held in *Metro I*[22] that Bell meets the first prong of the *Midcal* Test. As neither *Ticor* nor any other Supreme Court decision or subsequent legislation has changed the legal foundation of that holding, we are bound by the law of the case doctrine to follow our finding in *Metro I* that the Texas system satisfies the first *Midcal* prong.

2. *State Supervision*

[5-6] The real issue in this appeal, then, is the second prong of the *Midcal* Test — whether the state of Texas *actively supervises* the regulatory conduct in question within the contemplation of *Ticor*. The challenged conduct in *Ticor* was a horizontal price-fixing scheme within the title insurance industry. In the instant case, the identity of the challenged conduct is the focus of dispute between the parties. On one hand, Metro insists that the challenged conduct is Bell's threat to cut-off Metro's access to Bell's phone lines, thereby forcing Metro out of business. On the other hand, Bell contends that the challenged conduct is the application of the appropriate rate. According to Bell, the rate is set by the PUC and Bell has no discretion in its application. Bell also explains that the "threat" to cut-off Metro's line access was merely the explained consequences that would follow if — but only if — Metro refused to pay the appropriate line charges.

Despite Metro's protestations, the conduct which it challenges is the application of the established rates. Metro's attempt to finesse the language of PURA and to manipulate the facts is mere obfuscation. Although the ultimate *effect* of Bell's application of the higher rates may well be the death knell of Metro's business,

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[21] PURA § 2.

[22] *Metro I*, 901 F.2d at 1267.

that does not alter the character of Bell's initial conduct. In other words, the possible *future consequences* of the action are irrelevant to our inquiry. Neither is it of consequence that Bell may have harbored some secret desire to rid itself of a competitor. The state action doctrine "'does not depend on the subjective motivation of the individual actors, but rather on the satisfaction of the objective standards set forth in *Parker* ... and authorities which interpret it.'"[23] The only question for our review is whether the state sufficiently supervises the challenged conduct — here, the ratemaking and rate application process.

Having identified the challenged conduct, we now examine the requirements of *Midcal's* active supervision prong, as newly restated in *Ticor*. In that case, the Supreme Court held that "'the mere presence of some state involvement or monitoring does not suffice.'"[24] Rather, the state supervision must be active; state officials must be vested with the power to review particular anti-competitive acts and to disapprove those actions that do not comply with state policy.[25] "[T]he purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties."[26]

The Texas regulatory structure under PURA provides for an active role for the PUC. The PUC is authorized to establish rates, which are defined as "every compensation ... and any rules, regula-

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[23] *Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 434 (9th Cir.1992) (quoting *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir.1985)).

[24] *Ticor*, 504 U.S. ___ at 112 S.Ct. at 2177, 119 L.Ed.2d at 422 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-101, 108 S.Ct. 1658, 1662-63, 100 L.Ed.2d 83 (1988)).

[25] *Id.* 504 U.S. at ___, 112 S.Ct. at 2177, 119 L.Ed.2d at 422-23.

[26] *Id.*

tions, practices or contracts affecting any such compensation, tariff ... or classification."[27] The PUC's authority, therefore, is not limited to reviewing the fee charged for a particular service, but in fact extends to reviewing rules, regulations, and practices of a utility. In addition, PURA provides a forum for complaints from any affected person or from the PUC "whenever the regulatory authority ... finds that the existing rates of any public utility for any service are unreasonable or in any way in violation of any provision of the law."[28]

Alone, however, this potential for supervision does not satisfy the second prong of the *Midcal* test. The PUC must actually fulfill the active role granted to it under the statute.

A review of the record demonstrates to our comfortable satisfaction that the PUC does in fact actively supervise ratemaking and enforcement as defined by PURA to include the rules, regulations, and practices of utilities. The record reflects numerous references to the PUC's inquiry into the reasonableness of Bell's rates, in Docket 8585 filed January 4, 1989.[29] In addition to this specific inquiry into Bell's rates, published decisions reflect that the PUC has conducted other broadbased ratemaking proceedings.[30] In like manner, the record and published opinions together

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[27] PURA § 3(d).

[28] PURA § 42.

[29] Docket 8585, *Inquiry of the General Counsel Into the Reasonableness of the Rates and Services of Southwestern Bell Tel. Co.*, 17 PUC BULL. 1045 (Nov. 29, 1990, on rehearing Jan. 10, 1991).

[30] Docket 6200, *Petition of Southwestern Bell Tel. Co. for Authority to Change Rates*, 14 PUC BULL. 490 (June 26, 1986); Docket No. 5220, *Petition of Southwestern Bell Tel. Co. for Authority to Change Rates*, 10 PUC BULL. 255 (May 14, 1984); Docket No. 5113, *Phase I: Petition of the Pub. Util. Comm'n for an Inquiry Concerning the Effects of the Modified Final Judgment and the Access Charge Order Upon Southwestern Bell Tel. Co. and the Independent Tel. Cos. of Texas*, 13 PUC BULL. 493 (July 2, 1984) (motion for reh'g denied, Aug. 6, 1984); Docket No. 4545, *Petition of Southwestern Bell Tel. Co. for Authority to Change Rates*, 8 PUC BULL. 173 (Jan. 3, 1983); Docket No. 3920, *Application of Southwestern Bell Tel. Co.*

demonstrate that PURA provides a forum for complaints regarding the application of tariffs.[31]

Most importantly, Metro and Bell filed a joint pleading reorganizing that, while this suit was pending, the PUC was adjudicating the *very same issues presented in the instant case*. In fact, the very same attorneys participated in these state proceedings in January 1992. It is ludicrous, almost to the point of frivolity, for Metro to contend that the PUC does not actively supervise the conduct in question given the fact that Metro and Bell are awaiting a PUC decision on Bell's actions "as we speak."

These indisputable public records make it abundantly clear that the Texas regulatory scheme is a far cry from the passive regulatory schemes at issue in *Ticor* which failed the *Midcal* test. The systems contested in Ticor provided virtually no actual state supervision, allowing rates to come into effect with only minimal review of some of the rates for mathematical accuracy.[32] Instead of featuring independent state ratemaking, the title insurance rates at issue were set by the title insurance industry itself, with no input from or control by the states. Obviously, under such schemes, the absence of any state involvement prevents the private conduct at issue from qualifying for anti-trust immunity under the state action doctrine.

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for Authority to Increase Rates, 6 PUC BULL. 719 (Dec. 11, 1981) Docket No. 3340, *Application of Southwestern Bell Tel. Co. for Authority to Increase Rates*, 6 PUC BULL. 627 (Jan. 29, 1981); Docket No. 2672, *Application of Southwestern Bell Tel. Co. for Authority to Change Rates*, 5 PUC BULL. 163 (Nov. 9, 1979); Docket No. 1704, *Re: The Application of Southwestern Bell Tel. Co. For Authority to Change Rules*, 3 PUC BULL. 1758 (Aug. 2, 1978); Docket No. 78, *Re: The Application of Southwestern Bell Tel. Co. for Rate Increase*, 2 PUC BULL. 432 (Jan. 10, 1977).

[31] *See, e.g.*, Docket 7952, *Complaint of MetroLink Telecom, Inc., Against Southwestern Bell Tel. Co.*, (Examiner's Report & Recommendatoin) (Dec. 18, 1990); Docket 7438, *Complaint of Metro-Net Against Southwestern Bell Tel. Co.*, 14 PUC Bull. 334 (May 20, 1988).

[32] Ticor, 504 U.S. at _____, 112 S.Ct. at 2179, 119 L.Ed.2d at 425.

The Texas public utilities regulatory scheme, by contrast, does not suffer from this flaw. The Texas system authorizes the state, though the Commission, to control the initial establishment of rates, rules and regulations of the utilities, and allows a complaining party to challenge the application of a particular rate through the PUC. And, more importantly, the record before us confirms that the PUC acts under that grant of authority with sufficient involvement to satisfy *Ticor's* interpretation of the second prong of the *Midcal* test.

IV

CONCLUSION

That the Texas system meets the first prong of the *Midcal* test is a given in this latest chapter of the *Metro* litigation by virtue of the law of the case doctrine. And, when we view the "summary judgment evidence" in the record of the instant case as a whole, we conclude beyond serious question that the Texas regulatory scheme also satisfies the second or active supervision prong of the *Midcal* test as contemplated by *Ticor*. Bell is therefore entitled to anti-trust immunity. Consequently, Metro cannot state and has not stated a claim on which relief may be granted, so that the district court's dismissal of Metro's claim is in all respects proper.

AFFIRMED.

B1

UNITED STATES SUPREME COURT

U. S. Metroline Services, Inc.,

Petitioner,

v.

Southwestern Bell Telephone Company,

Respondent.

No. 91-1269

June 22, 1992

Case below, *DFW Metro Line v. SW Bell Telephone*, 947 F.2d 1486.

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fifth Circuit for further consideration in light of *Federal Trade Commission v. Ticor Title Insurance*, 504 U.S._____, 112 S.Ct. 2169, _____ L.Ed.2d _____(1992).

Justice O'CONNOR took no part in the consideration of this case.

C1

UNITED STATES SUPREME COURT

FEDERAL TRADE COMMISSION,

Petitioner,

v.

TICOR TITLE INSURANCE COMPANY, et al.

Respondents.

No. 91-72
Argued Jan. 13, 1992.
Decided June 12, 1992.

Federal Trade Commission (FTC) filed administrative complaint charging title insurance companies with horizontal price fixing and setting fees for title searches and examinations, in violation of the Federal Trade Commission Act. The FTC determined that companies engaged in unfair methods of competition in Connecticut, Wisconsin, Arizona, and Montana, and companies petitioned for review. The Court of Appeals for the Third Circuit, 922 F.2d 1122, reversed, and FTC petitioned for certiorari. The Supreme Court, Justice Kennedy, held that state action immunity was not available under regulatory schemes in Wisconsin and Montana.

Reversed and remanded.

Justice Scalia filed a concurring opinion.

Chief Justice Rehnquist filed a dissenting opinion, in which Justice O'Connor and Justice Thomas joined.

Justice O'Connor filed a dissenting opinion, in which Justice Thomas joined.

1 Monopolies 12(1)

Preservation of free market and of system of free enterprise without price fixing or cartels is essential to economic freedom; national policy of such pervasive and fundamental character is essential part of economic and legal system within which the separate states

administer their own laws for protection and advancement of their people.

1 Monopolies 17(1.12)

Preservation of free market and of system of free enterprise without price fixing or cartels is essential to economic freedom; national policy of such pervasive and fundamental character is essential part of economic and legal system within which the separate states administer their own laws for protection and advancement of their people.

2 Monopolies 12(15.6)

Continued enforcement of national antitrust policy grants states more freedom, not less, in deciding whether to subject discrete parts of economy to additional regulations and controls.

3 Monopolies 12(15.6)

For state law or regulatory scheme to be basis for antitrust immunity, state must have articulated clear and affirmative policy to allow anticompetitive conduct, and state must provide active supervision of anticompetitive conduct undertaken by private actors.

4 Monopolies 12(15.6)

While state may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if displacement is both intended by state and implemented in specific details; actual state involvement, not deference to private price fixing arrangements under general auspices of state law, is precondition for immunity from federal law.

5 Monopolies 12(15.6)

Purpose of active supervision inquiry in state antitrust immunity analysis is not to determine whether state has met some normative standard, such as efficiency, in its regulatory practice, but is to determine whether state has exercised sufficient independent judgment and control so that details of rates or prices have been established as product of deliberate state intervention, not simply

by agreement among private parties; analysis asks whether state has played substantial role in determining specifics of economic policy.

6 Monopolies 12(15.6)

Principles of federalism do not justify broad interpretation of state-action immunity, requiring only articulation by state of clear affirmative policy, without regard to whether state provides active supervision of anticompetitive conduct, for neither federalism nor political responsibility is well served by rule that essential national policies are displaced by state regulations intended to achieve more limited ends; for states which do choose to displace free market with regulation, insistence on real compliance with both parts of state-action immunity test will serve to make clear that state is responsible for price fixing it has sanctioned and undertaken to control.

7 Monopolies 12(15.6)

Where prices or rates are set as initial matter by private parties, subject only to veto if state chooses to exercise it, party claiming immunity must show that state officials have undertaken necessary steps to determine specifics of price-fixing or rate setting scheme; mere potential for state supervision is not adequate substitute for decision by state.

8 Monopolies 12(15.6)

There was insufficient state participation in title insurance companies' rate setting schemes for title search and title examination fees in Wisconsin and Montana for schemes, alleged to violate Federal Trade Commission Act provision prohibiting unfair methods of competition in or affecting commerce, to come within state action immunity doctrine, though both states adopted procedures whereby rating bureaus filed rates with state agencies and rates would become effective unless rejected within set time, in view of detailed administrative findings demonstrating that potential state supervision was not realized in fact. Federal Trade Commission Act, § 5(a)(1), 15 U.S.C.A. § 45(a)(1).

Syllabus*

Petitioner Federal Trade Commission filed an administrative complaint charging respondent title insurance companies with horizontal price fixing in setting fees for title searches and examinations in violation of s 5(a)(1) of the Federal Trade Commission Act. In each of the four States at issue — Connecticut, Wisconsin, Arizona, and Montana — uniform rates were established by a rating bureau licensed by the State and authorized to establish joint rates for its members. Rate filing were made to the state insurance office and became effective unless the State rejected them within a specified period. The Administrative law Judge held, inter alia, that the rates had been fixed in all four States, but that, in Wisconsin and Montana, respondents' anticompetitive activities were entitled to state-action immunity, as contemplated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, and its progeny. Under this doctrine, a state law or regulatory scheme can be the basis for antitrust immunity if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233. The Commission, which conceded that the first part of the test was met, held on review that none of the States had conducted sufficient supervision to warrant immunity. The Court of Appeals reversed, holding that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement. Thus, it concluded, respondents' conduct in all the States was entitled to state-action immunity.

Held:

1. State-action immunity is not available under the regulatory schemes in Montana and Wisconsin. Pp.2176-2180.

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* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

(a) Principles of federalism require that federal antitrust laws be subject to supersession by state regulatory programs. *Parker*, supra, 317 U.S., at 350-352, 63 S.Ct., at 312-14; *Midcal*, supra; *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83. *Midcal's* two-part test confirms that States may not confer antitrust immunity on private persons by fiat. Actual state involvement is the precondition for immunity, which is conferred out of respect for the State's ongoing regulation, not the economics of price restraint. The purpose of the active supervision inquiry is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention. Although this immunity doctrine was developed in actions brought under the Sherman Act, the issue whether it applies to Commission action under the Federal Trade Commission Act need not be determined, since the Commission does not assert any superior pre-emption authority here. Pp. 2176-2178.

(b) Wisconsin, Montana, and 34 other States correctly contend that a broad interpretation of state-action immunity would not serve their best interests. The doctrine would impede, rather than advance, the States' freedom of action if it required them to act in the shadow of such immunity whenever they entered the realm of economic regulation. Insistence on real compliance with both parts of the *Midcal* test serves to make clear that the States are responsible for only the price fixing they have sanctioned and undertaken to control. Respondents' contention that such concerns are better addressed by the first part of the *Midcal* test misapprehends the close relation between *Midcal's* two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. A clear policy statement ensures only that the State did not act through inadvertence, not that the State approved the anticompetitive conduct. Sole reliance on the clear articulation requirement would not allow the States sufficient regulatory flexibility. Pp. 2177-2179.

(c) Where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the

immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate-setting scheme. The mere potential for state supervision is not an adequate substitute for the State's decision. Thus, the standard relied on by the Court of Appeals in this case is insufficient to establish the requisite level of active supervision. The Commission's findings of fact demonstrate that the potential for state supervision was not realized in either Wisconsin or Montana. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Moreover, one rate filing became effective in Montana despite the rating bureau's failure to provide requested information, and additional information was provided in Wisconsin after seven years, during which time another rate filing remained in effect. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And state judicial review cannot fill the void. See *Patrick*, supra, 486 U.S., at 103-105, 108 S.Ct., at 1664-65. This Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36, which involved a similar negative option regime, is to the contrary, since it involved the question whether the first part of the *Midcal* test was met. This case involves horizontal price fixing under a vague imprimatur in form and agency inaction in fact, and it should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. Pp. 2178-2180.

2. The Court of Appeals should have the opportunity to reexamine its determinations with respect to Connecticut and Arizona in order to address whether it accorded proper deference to the Commission's factual findings as to the extent of state supervision in those States. P.2180.

922 F.2d 1122 (CA3 1991), reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion. REHNQUIST,

C.J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined.

Lawrence G. Wallace, Washington, D.C., argued, for petitioner.

John C. Christie, Jr., Washington, D.C., argued, for respondents.

Justice KENNEDY delivered the opinion of the Court.

The Federal Trade Commission filed an administrative complaint against six of the nation's largest title insurance companies, alleging horizontal price fixing in their fees for title searches and title examinations. One company settled by consent decree, while five other firms continue to contest the matter. The Commission charged the title companies with violating s 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. s 45(a)(1), which prohibits "[u]nfair methods of competition in or affecting commerce." One of the principal defenses the companies assert is state-action immunity from antitrust prosecution, as contemplated in the line of cases beginning with *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Commission rejected this defense, *In re Ticor Title Ins..*, 112 F.T.C. 344 (1989), and the firms sought review in the United States Court of Appeals for the Third Circuit. Ruling that state-action immunity was available under the state regulatory schemes in question, the Court of Appeals reversed. 922 F.2d 1122 (1991). We granted certiorari. 502 U.S. ___, 112 S.Ct. 47, 116 L.Ed.2d 25(1991).

I

Title insurance is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance policy, the insurance company or one of its agents performs a title search and examination. The

search produces a chronological list of the public documents in the chain of title to the real property. The examination is a critical analysis or interpretation of the condition of title revealed by the documents disclosed through this search.

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee.

The title insurance industry earned $1.35 billion gross revenues, in 1982, and respondents accounted for 57 percent of that amount. Four of respondents are the nation's largest title insurance companies: Ticor Title Insurance Co., with 16.5 percent of the market; Chicago Title Insurance Co., with 12.8 percent; Lawyers Title Insurance Co., with 12 percent; and SAFECO Title Insurance Co. (now operating under the name Security Union Title Insurance Co.), with 10.3 percent. Stewart Title Guarantee Co., with 5.4 percent of the market, is the country's eighth largest title insurer, with a strong position in the West and Southwest.

The Commission issued an administrative complaint in 1985. Horizontal price-fixing was alleged in these terms: "'Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the

Respondents have fixed prices with other Respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.'" 112 F.T.C., at 346. The Commission did not challenge the insurers' practice of setting uniform rates for insurance against the risk of loss from defective titles, but only the practice of setting uniform rates for the title search, examination, and settlement, aspects of the business which, the Commission alleges, do not involve insurance.

Before the Administrative Law Judge (ALJ), the respondents defended against liability on three related grounds. First, they maintained that the challenged conduct is exempt from antitrust scrutiny under the McCarran-Ferguson Act, 59 Stat. 34, 15 U.S.C. s 1012(b), which confers antitrust immunity over the "business of insurance" to the extent regulated by state law. Second, they argued that their collective ratemaking activities are exempt under the Noerr-Pennington doctrine, which places certain "[j]oint efforts to influence public officials" beyond the reach of the antitrust laws. *Mine Workers v. Pennington*, 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 529, 5 L.Ed.2d 464 (1961). Third, respondents contended their activities are entitled to state-action immunity, which permits anticompetitive conduct if authorized and supervised by state officials. See *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.315 (1943). As to one State, Ohio, the respondents contended that the rates for title search, examination, and settlement had not been set by a rating bureau.

Title insurance company rates and practices in thirteen States were the subject of the initial complaint. Before the matter was decided by the ALJ, the Commission declined to pursue its complaint with regard to fees in five of these States, Louisiana, New Mexico, New York, Oregon, and Wyoming. Upon the recommen-

dation of the ALJ, the Commission did not pursue its complaint with regard to fees in two additional States, Idaho and Ohio. This left six States in which the Commission found antitrust violations, but in two of these States, New Jersey and Pennsylvania, the Commission conceded the issue on which certiorari was sought here, so the regulatory regimes in these two States are not before us. Four States remain in which violations were alleged: Connecticut, Wisconsin, Arizona, and Montana.

The ALJ held that the rates for search and examination services had been fixed in these four States. For reasons we need not pause to examine, the ALJ rejected the McCarran-Ferguson and Noerr-Pennington defenses. The ALJ then turned his attention to the question of state-action immunity. A summary of the ALJ's extensive findings on this point is necessary for a full understanding of the decisions reached at each level of the proceedings in the case.

Rating bureaus are private entities organized by title insurance companies to establish uniform rates for their members. The ALJ found no evidence that the collective setting of title insurance rates through rating bureaus is a way of pooling risk information. Indeed, he found no evidence that any title insurer sets rates according to actuarial loss experience. Instead, the ALJ found that the usual practice is for rating bureaus to set rates according to profitability studies that focus on the costs of conducting searches and examinations. Uniform rates are set notwithstanding differences in efficiencies and costs among individual members.

The ALJ described the regulatory regimes for title insurance rates in the four States still at issue. In each one, the title insurance rating bureau was licensed by the State and authorized to establish joint rates for its members. Each of the four States used what has come to be called a "negative option" system to approve rate filings by the bureaus. Under a negative option system, the rating bureau filed rates for title searches and title examinations with the state insurance office. The rates became effective unless the State rejected them within a specified period, such as 30 days. Although

the negative option system provided a theoretical mechanism for substantive review, the ALJ determined, after making detailed findings regarding the operation of each regulatory regime, that the rate filings were subject to minimal scrutiny by state regulators.

In Connecticut the State Insurance Department has the authority to audit the rating bureau and hold hearings regarding rates, but it has not done so. The Connecticut rating bureau filed only two major rate increases, in 1966 and in 1981. The circumstances behind the 1966 rate increase are somewhat obscure. The ALJ found that the Insurance Department asked the rating bureau to submit additional information justifying the increase, and later approved the rate increase although there is no evidence the additional information was provided. In 1981 the Connecticut rating bureau filed for a 20 percent rate increase. The factual background for this rate increase is better developed though the testimony was somewhat inconsistent. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. The same official testified, however, that he lacked the authority to question certain expense data he considered quite high.

In Wisconsin the State Insurance Commissioner is required to examine the rating bureau at regular intervals and authorized to reject rates through a process of hearings. Neither has been done. The Wisconsin rating bureau made major rate filings in 1971, 1981, and 1982. The 1971 rate filing was approved in 1971 although supporting justification, which had been requested by the State Insurance Commissioner, was not provided until 1978. The 1981 rate filing requested an 11 percent rate increase. The increase was approved after the office of the Insurance Commissioner checked the supporting data for accuracy. No one in the agency inquired into insurer expenses, though an official testified that substantive scrutiny would not be possible without that inquiry. The 1982 rate increase received but a cursory reading at the office of the Insurance Commissioner. The supporting materials were not checked for accuracy, though in the absence of an objection by the agency, the rate increase went into effect.

In Arizona the Insurance Director was required to examine the rating bureau at least once every five years. It was not done. In 1980 the State Insurance Department announced a comprehensive investigation of the rating bureau. It was not conducted. The rating bureau spent most of its time justifying its escrow rates. Following settlement in 1981 of a federal civil suit challenging the joint fixing of escrow rates, the rating bureau went out of business without having made any major rate filings, though it had proposed minor rate adjustments.

In Montana the rating bureau made its only major rate filing in 1983. In connection with it, a representative of the rating bureau met with officials of the State Insurance Department. He was told that the filed rates could go into immediate effect though further profit data would have to be provided. The ALJ found no evidence that the additional data were furnished.

To complete the background, the ALJ observed that none of the rating bureaus are now active. The respondents abandoned them between 1981 and 1985 in response to numerous private treble damage suits, so by the time the Commission filed its formal complaint in 1985, the rating bureaus had been dismantled. The ALJ held that the case is not moot, though, because nothing would preclude respondents from resuming the conduct challenged by the Commission. See *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

These factual determinations established, the ALJ addressed the two-part test that must be satisfied for state-action immunity under the antitrust laws, the test we set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors. Id., at 105, 100 S.Ct., at 943. The Commission having conceded that the first part of the test was satisfied in the four States still at issue, the

immunity question, beginning with the hearings before the ALJ and in all later proceedings, has turned upon the proper interpretation and application of *Midcal's* active supervision requirement. The ALJ found the active supervision test was met in Arizona and Montana but not in Connecticut or Wisconsin.

On review of the ALJ's decision, the Commission held that none of the four states had conducted sufficient supervision, so that the title companies were not entitled to immunity in any of those jurisdictions. The Court of Appeals for the Third Circuit disagreed with the Commission, adopting the approach of the First Circuit in *New England Motor Rate Bureau, Inc., v. FTC*, 908 F.2d 1064 (1990), which had held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the requirement of active supervision. Id., at 1071. Under this standard, the Court of Appeals for the Third Circuit ruled that the active state supervision requirement was met in all four states and held that the respondents' conduct was entitled to state action immunity in each of them.

We granted certiorari to consider two questions: First, whether the Third Circuit was correct in its statement of the law and in its application of law to fact, and second, whether the Third Circuit exceeded its authority by departing from the factual findings entered by the ALJ and adopted by the Commission. Before this Court, the parties have confined their briefing on the first of these questions to the regulatory regimes of Wisconsin and Montana, and focused on the regulatory regimes of Connecticut and Arizona in briefing on the second question. We now reverse the Court of Appeals under the first question and remand for further proceedings under the second.

II

[1][2] The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972). A national policy of such a pervasive and fundamental character is an

essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls. Against this background, in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), we upheld a state-supervised market sharing scheme against a Sherman Act challenge. We announced the doctrine that federal antitrust laws are subject to supersession by state regulatory programs. Our decision was grounded in principles of federalism. Id., at 350-352, 63 S.Ct., at 312-13.

[3][4] The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions in *Midcal*, supra, and *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). In *Midcal* we invalidated a California statute forbidding licensees in the wine trade from selling below prices set by the producer. There we announced the two-part test applicable to instances where private parties participate in a price fixing regime. "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Midcal*, 445 U.S., at 105, 100 S.Ct., at 943, (internal quotation marks omitted). *Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint. In *Midcal* we found that the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics

of the price posting was so apparent that the requirement of active supervision had not been met. *Ibid.*

The rationale was further elaborated in *Patrick v. Burget.* In *Patrick* it had been alleged that private physicians participated in the State's peer review system in order to injure or destroy competition by denying hospital privileges to a physician who had begun a competing clinic. We referred to the purpose of preserving the State's own administrative policies, as distinct from allowing private parties to foreclose competition, in the following passage: "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.... The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.... The mere presence of some state involvement or monitoring does not suffice.... The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interest." 486 U.S., at 100-101, 108 S.Ct., at 1663 (internal quotation marks and citations omitted). Because the particular anticompetitive conduct at issue in Patrick had not been supervised by governmental actors, we decided that the actions of the peer review committee were not entitled to state-action immunity. *Id.*, 486 U.S., at 106, 108 S.Ct., at 1666.

[5] Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exer-

cised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Although the point bears but brief mention, we observe that our prior cases considered state-action immunity against actions brought under the Sherman Act, and this case arises under the Federal Trade Commission Act. The Commission has argued at other times that state-action immunity does not apply to Commission action under s 5 of the Federal Trade Commission Act, 15 U.S.C s 45. See U.S. Bureau of Consumer Protection, *Staff Report to the Federal Trade Commission on Prescription Drug Price Disclosures,* Chs. VI(B) and (C) (1975); see also Note, The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act, 89 Harv.L.Rev. 715 (1976). A leading treatise has expressed its skepticism of this view. See 1 P. Areeda & D. Turner, *Antitrust Law* P 218 (1978). We need not determine whether the antitrust statutes can be distinguished on this basis, because the Commission does not assert any superior pre-emption authority in the instant matter. We apply our prior cases to the one before us.

[6] The respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The State of Wisconsin, joined by Montana and 34 other States, has filed a brief as amici curiae on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the amici submission.

If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our

doctrine will impede their freedom of action, not advance it. The fact of the matter is that the States regulate their economies in many ways not inconsistent with the antitrust laws. For example, Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. See *Patrick*, supra, at 105, 108 S.Ct., at 1665. Or Michigan may regulate its public utilities without authorizing monopolization in the market for electric light bulbs. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976). So we have held that state-action immunity is disfavored, much as are repeals by implication. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978). By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

The respondents contend that these concerns are better addressed by the requirement that the States articulate a clear policy to displace the antitrust laws with their own forms of economic regulation. This contention misapprehends the close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. *See Patrick, supra*, 486 U.S., at 100, 108 S.Ct., at 1662. In the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; it cannot alone ensure,

as required by our precedents, that particular anticompetitive conduct has been approved by the State. It seems plain, moreover, in light of the amici curiae brief to which we have referred, that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these States deem necessary. For States whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.

III

In the case before us, the Court of Appeals relied upon a formulation of the active supervision requirement articulated by the First Circuit: "'Where...the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.'" 922 F.2d, at 1136, quoting *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1071 (CA1 1990). Based on this standard, the Third Circuit ruled that the active supervision requirement was met in all four states, and held that the respondents' conduct was entitled to state-action immunity from antitrust liability. 922 F.2d, at 1140.

[7][8] While in theory the standard articulated by the First Circuit might be applied in a manner consistent with our precedents, it seems to us insufficient to establish the requisite level of active supervision. The criteria set forth by the First Circuit may have some relevance as the beginning point of the active state supervision inquiry, but the analysis cannot end there. Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or

ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana.

The respondents point out that in Wisconsin and Montana the rating bureaus filed rates with state agencies and that in both States the so-called negative option rule prevailed. The rates became effective unless they were rejected within a set time. It is said that as a matter of law in those States inaction signified substantive approval. This proposition cannot be reconciled, however, with the detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact. The ALJ found, and the Commission agreed, that at most the rate filings were checked for mathematical accuracy. Some were unchecked altogether. In Montana, a rate filing became effective despite the failure of the rating bureau to provide additional requested information. In Wisconsin, additional information was provided after a lapse of seven years, during which time the rate filing remained in effect. These findings are fatal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision. The findings demonstrate that, whatever the potential for state regulatory review in Wisconsin and Montana, active state supervision did not occur. In the absence of active supervision in fact, there can be no state-action immunity for what were otherwise private price fixing arrangements. And as in *Patrick*, the availability of state judicial review could not fill the void. Because of the state agencies' limited role and participation, state judicial review was likewise limited. *See Patrick*, 486 U.S., at 103-105, 108 S.Ct., at 1664-65.

Our decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), though it too involved a negative option regime, is not to the contrary. The question there was whether the first part of the *Midcal* test was met, the Government's contention being that a pricing policy is not an articulated one unless the practice is

compelled. We rejected that assertion and undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. Id., at 62, 66, 105 S.Ct., at 1729, 1731. The concession was against the background of a district court determination that, although submitted rates could go into effect without further state activity, the State had ordered and held rate-making hearings on a consistent basis, using the industry submissions as the beginning point. *See United States v. Southern Motor Carriers Rate Conference, Inc.*, 467 F.Supp. 471, 476-477 (ND Ga.1979). In the case before us, of course, the Government concedes the first part of the *Midcal* requirement and litigates the second; and there is no finding of substantial state participation in the rate setting scheme.

This case involves horizontal price fixing under a vague imprimatur in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 434, n. 16, 110 S.Ct. 768, 781, n. 16, 107 L.Ed.2d 851 (1990). In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be to read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. *Cf. Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. ___, 111 S.Ct. 1344, 113 L.Ed.2d 382 91991) (city billboard zoning ordinance entitled to state-action immunity). We do not have before us a case in which governmental actors made unilateral decisions without participation by private actors. *Cf. Fisher v. Berkeley*, 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986) (private actors not liable without private action). And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. *Cf. 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344, n. 6, 107 S.Ct. 720, 725,

n. 6, 93 L.Ed.2d 667 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement). In the circumstances of this case, however, we conclude that the acts of the respondents in the States of Montana and Wisconsin are not immune from antitrust liability.

IV

In granting certiorari we undertook to review the further contention by the Commission that the Court of Appeals was incorrect in disregarding the Commission's findings as to the extent of state supervision. The parties have focused their briefing on this question on the regulatory schemes of Connecticut and Arizona. We think the Court of Appeals should have the opportunity to reexamine its determinations with respect to these latter two States in light of the views we have expressed.

The judgment of the Court of Appeals is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

The Court's standard is in my view faithful to what our cases have said about "active supervision." On the other hand, I think THE CHIEF JUSTICE and JUSTICE O'CONNOR are correct that this standard will be fertile source of uncertainty and (hence) litigation, and will produce total abandonment of some state programs because private individuals will not take the chance of participating in them. That is true, moreover, not just in the "negative-option" context, but even in a context such as that involved in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988): Private physicians invited to participate in a state-supervised hospital peer review system may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be "active" enough. I am willing to accept these consequences because I see no alternative within the constraints of our "active supervision" doctrine, which has not been challenged here; and

because I am skeptical about the *Parker v. Brown* exemption for state-programmed private collusion in the first place.

Chief Justice REHNQUIST, with whom Justice O'CONNOR and Justice THOMAS join, dissenting.

The Court holds today that to satisfy the "active supervision" requirement of state action immunity from antitrust liability, private parties acting pursuant to a regulatory scheme enacted by a state legislature must prove that "the State has played a substantial role in determining the specifics of the economic policy." *Ante*, at 2177. Because this standard is neither supported by our prior precedent, nor sound as a matter of policy, I dissent.

Immunity from antitrust liability under the state action doctrine was first established in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). As noted by the majority, in *Parker*, we relied on principles of federalism in concluding that the Sherman Act did not apply to state officials administering a regulatory program enacted by the state legislature. We concluded that state action is exempt from antitrust liability, because in the Sherman Act Congress evidences no intent to "restrain state action or official action directed by a state." *Id.*, at 351, 63 S.Ct., at 312.[1] "The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56, 105 S.Ct. 1721, 1726, 85 L.Ed.2d 36 (1985) (footnote omitted).

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[1] The Court states that "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls" *ante*, at 2176. However, in *Parker*, we held that the Sherman Act simply does not apply to conduct regulated by the State. The enforcement of the national antitrust policy, as embodied in the antitrust laws, may grant individuals more freedom to compete in our free market system, but it does not implicate the freedom of the States in deciding whether to regulate.

We developed our present analysis for state-action immunity for private actors in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). We held in *Midcal* that our prior precedent had granted state-action immunity from antitrust liability to conduct by private actors where a program was "clearly articulated and affirmatively expressed as state policy [and] the policy [was] actively supervised by the State itself." *Id.*, at 105, 100 S.Ct., at 943 (internal quotation marks and citation omitted). In *Midcal*, we found the active supervision requirement was not met because under the California statute at issue, which required liquor retailers to charge a certain percentage above a price "posted" by area wholesalers, "[t]he State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.*, at 100, 100 S.Ct., at 940. We noted that the state action defense does not allow the States to authorize what is nothing more than private price fixing. *Id.*, at 105, 100 S.Ct., at 943.

In each instance since *Midcal* in which we have concluded that the active supervision requirement for state action immunity was not met, the state regulators laced authority, under state law, to review of reject the rates or action taken by the private actors facing antitrust liability.[2] Our most recent formulation of the "active supervision" requirement was announced in *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), where we concluded that to satisfy the "active supervision" requirement, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." Id., at 101,108 S.Ct., at 1663. Until today, therefore, we have never had occasion to determine whether

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[2] In *324 Liquor Corp. v. Duffy*, 479 U.S. 355, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), we held that a new York statute failed to shelter private actors from antitrust liability because the state legislation required retailers to charge 112% of the price "posted" by wholesalers. The New York statute, like the California statute at issue in *Midcal*, gave no power to the state agency to review or establish the reasonableness of the price schedules "posted" by the wholesalers. *Id.*, 479 U.S., at 345, 107 S.Ct., at 726.

a state regulatory program which gave state officials authority — "power" — to review and regulate prices or conduct, might still fail to meet the requirement for active state supervision because the state's regulation was not sufficiently detailed or rigorous.

Addressing this question, the Court of Appeals in this case used the following analysis: "'Where, as here, the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.'" 922 F.2d 1122, 1136 (CA3 1991), quoting *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1071 (CA1 1990). The Court likens this test to doing away all together with the active supervision requirement for immunity based on state action. But the test used by the Court of Appeals is much more closely attuned to our "have and exercise power" formulation in *Patrick v. Burget* than is the rule adopted by the Court today. The Court simply doesn't say just how active a State's regulators must be before the "active supervision" requirement will be satisfied. The only guidance it gives is that the inquiry should be one akin to causation in a negligence case; does the State play "a substantial role in determining the specifics of the economic policy." *Ante*, at 2177. Any other formulation, we are told, will remove the active supervision requirement all together as a practical matter.

I do not believe this to be the case.[3] In the States at issue here, the particular conduct was approved by a state agency. The agency manifested this approval by raising no objection to a required rate filing by the entity subject to regulation. This is quite consistent with our statement that the active supervision requirement serves

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[3] The state regulatory programs in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), and *324 Liquor, supra*, would all fail to provide immunity for lack of active supervision under the test adopted by the Court of Appeals.

mainly an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy...." *Hallie v. Eau Claire*, 471 U.S. 34, 46, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 24 (1985).

The Court insists that its newly required "active supervision" will "increase the States' regulatory flexibility." *Ante*, at 2178. But if private actors who participate, through a joint rate filing, in a State's "negative option" regulatory scheme may be liable for treble damages if they cannot prove that the State approved the specifics of a filing, the Court makes it highly unlikely that private actors will choose to participate in such a joint filing. This in turn lessens the States' regulatory flexibility, because as we have noted before, joint rate filings can improve the regulatory process by ensuring that the state agency has fewer filings to consider, allowing more resources to be expended on each filing. *Southern Motor Carriers Rate Conference, Inc. v. United States, supra*, 471 U.S., at 51, 105 S.Ct. at 1723. The view advanced by the Court of Appeals does not sanction price fixing in areas regulated by a State "not inconsistent with the antitrust laws." *Ante*, at 2178. A State must establish, staff, and fund a program to approve jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune under the antitrust laws.[4]

The Court rejects the test adopted by the Court of appeals, stating that it cannot be the end of the inquiry. Instead, the party seeking immunity must "show that sate officials have undertaken the necessary steps to determine the specifics of the price-fixing or

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[4] In neither of the examples cited by the majority as instances of state regulation not intended to authorize anticompetitive conduct, would application of a less detailed active supervision test change the result. In *Patrick v. Burget*, supra, we concluded there was no immunity because the State did not have the authority to review the anticompetitive action undertaken by the peer review committee; in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), it is unlikely that the clear articulation requirement under our current jurisprudence would be met with respect to the market for light bulbs.

ratesetting scheme." *Ante*, at 2179.[5] Such an inquiry necessarily puts the federal court in the position of determining the efficacy of a particular State's regulatory scheme, in order to determine whether the State has met the "requisite level of active supervision." *Ante*, at 2179. The Court maintains that the proper state action inquiry does not determine whether a State has met some "normative standard" in its regulatory practices. *Ante*, at 2177. But the Court's focus on the actions taken by state regulators, i.e., the way the State regulates, necessarily requires a judgment as to whether the State is sufficiently active — surely a normative judgment.

The Court of Appeals found — properly, in my view — that while the States at issue here did not regulate respondents' rates with the vigor the petitioner would like, the States' supervision of respondents' conduct was active enough so as to provide for immunity from antitrust liability. The Court of Appeals, having concluded that the Commission applied an incorrect legal standard, reviewed the facts found by the Commission in light of the correct standard and reached a different conclusion. This does not constitute a rejection of the Commission's factual findings.

I would therefore affirm the judgment below.

Justice O'CONNOR, with whom Justice THOMAS joins, dissenting.

Notwithstanding its assertions to the contrary, the Court has diminished the State's regulatory flexibility by creating an impossible situation for those subject to state regulation. Even when a State has a "clearly articulated policy" authorizing anticompetitive behavior — which the Federal Trade Commission concedes was the case here — and even when the State establishes a system to supervise the implementation of that policy, the majority holds that a federal court may later find that the State's supervision was not

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[5] It is not clear, from the Court's formulation, whether this is a separate test applicable only to negative option regulatory schemes, or whether it applies more generally to issues of immunity under the state action doctrine.

sufficiently "substantial" in its "specifics" to insulate the anticompetitive behavior from antitrust liability. *Ante*, at 2177. Given the threat of treble damages, regulated entities that have the option of heeding the State's anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate. The practical effect of today's decision will likely be to eliminate so-called "negative option" regulation from the universe of schemes available to a State that seeks to regulate without exposing certain conduct to federal antitrust liability.

The Court does not dispute that each of the States at issue in this case could have supervised respondents' joint ratemaking; rather, it argues that "the potential for state supervision was not realized in fact." *Ante*, at 2179. Such an after-the-fact evaluation of a State's exercise of its supervisory powers is extremely unfair to regulated parties. Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its actions in the other resulted in treble-damage liability.

Moreover, even if a regulated entity could assure itself that the State will undertake to actively supervise its rate filings, the majority does not offer any guidance as to what level of supervision will suffice. It declares only that the State must "pla[y] a substantial role in determining the specifics of the economic policy." *Ante*, at 2177. That standard is not only ambiguous, but it also runs the risk of being counterproductive. The more reasonable a filed rate, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria. Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes "negative

option" regulation an unattractive option for both States and the parties they regulate.

Finally, it is important to remember that antitrust actions can be brought by private parties as well as by government prosecutors. The resources of state regulators are strained enough without adding the extra burden of asking them to serve as witnesses in civil litigation and respond to allegations that they did not do their job.

For these reasons, as well as those given by THE CHIEF JUSTICE, I dissent.

D1

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DFW Metroline Services,
(now known as
U.S. Metroline Services, Inc.),
Plaintiff-Appellant,

v.

Southwestern Bell Telephone Company
Defendant-Appellee.

No. 91-1364
Summary Calendar

October 23, 1991

Appeal from the United States District Court for the Northern District of Texas (CA 3 89 1698 G)

Before CLARK, Chief Judge, WILLIAMS, and BARKSDALE, Circuit Judges.

PER CURIAM:*

I.

U.S. Metro Line Services, Inc. (formerly DFW Metro Line Services) (DFW) appeals the district court's denial of DFW's motion for new trial or rehearing, motion for court directives, and motion and motion for leave to amend complaint. The district court denied these motions after granting the Rule 12(b)(6) motion to dismiss filed by Southwestern Bell Telephone Company (Bell). We affirm.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

II.

The recitation of facts is taken in large part from the court's prior opinion in DFW Metro Line Serv. v. S.W. Bell Telephone Co., 901 F.2d 1267 (5th Cir. 1990).

DFW offers a form of telephone service (flat-rate calling between Dallas and Fort Worth, sometimes called "metro service") that is also offered by Southwestern Bell. As part of the equipment for its metro service, DFW uses telephone lines that it leases from Bell. DFW filed suit for injunctive relief or damages after Bell informed DFW that Bell would discontinue its line leasing to DFW unless DFW began paying Bell much higher monthly rates reflecting access charges.

Bell's stated reason for requiring higher rates was that the lower rates that DFW had been paying were applicable only to companies using the lines for Radio Common Carrier services according to Bell's tariff approved by the Texas Public Utilities Commission (PUC). Bell stated that, to comply with its PUC approved tariff, it was required to charge DFW the higher rate applicable to the "resale"type of service for which (Bell had just learned) DFW was using the leased lines. DFW argued that Bell's tariff argument was just a sham to cover Bell's real motive to drive out DFW as a competitor in the metro service market.

Discovery proceeded while a temporary restraining order issued by the district court was in effect. The district court denied DFW's application for preliminary injunction. We affirmed, holding that DFW failed to make the threshold showing of irreparable injury, and further stating:

> As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in DFW's complaint under the "state action"doctrine enunciated in Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), as applied to private state-regulated ratemaking by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S. Ct. 21, 85 L. Ed. 2d 36 (1985). Southwestern Bell

> clearly meets the two prong test set out in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

DFW MetroLine Serv. v. S.W. Bell Telephone Co., 901 F.2d 1267, 1269 n.6 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 519 (1990).

After the trial court granted Bell's 12(b)(6) motion to dismiss, DFW filed a motion for new trial or rehearing, for court directives, and for leave to amend the complaint. DFW appeals from the trial court's denial of all of these motions.

III.

"An appellate court decision rendered at one stage of the case constitutes 'the law of the case' in all succeeding stages." *Knotts v. United States*, 893 F.2d 758, 761 (5th Cir. 1990). Our holding that "Bell is immune from the antitrust liability alleged"established the law of this case. Since the same liability is now reasserted, Bell is immune from liability here.

IV.

The judgment of the district court is

AFFIRMED.

E1

IN THE UNITED STATES COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DFW Metroline Services, Inc.,

Plaintiff,

v.

Southwestern Bell Telephone Company,

Defendant.

Civil Action No.
CA 3-89-1698-G

MEMORANDUM ORDER

This case is before the court on the motion of defendant Southwestern Bell Telephone Company ("Southwestern Bell") to dismiss the complaint of plaintiff DFW Metro Line Services ("Metro Line") for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons stated below, Southwestern Bell's motion is granted.

I. Background

Southwestern Bell and Metro Line are both involved in the telecommunications industry, and offer a form of telephone service that allows flat-rate calling between Dallas and Fort Worth, Texas. For Metro Line to provide this service, it must use telephone lines that it leases from Southwestern Bell. In June, 1989, Southwestern Bell claims to have discovered that Metro Line was paying a monthly rate for the telephone lines that was much lower than the rate normally charged to companies leasing telephone lines for Metro Line's intended purpose. Southwestern Bell informed Metro Line that it would discontinue leasing these lines to Metro Line unless Metro Line began paying the higher rate. Metro Line then filed this suit, alleging that Southwestern Bell's activity vio-

lated federal antitrust laws and requesting injunctive relief and damages.

On August 30, 1989, this court denied Metro Line's motion for a preliminary injunction. That decision was affirmed on appeal in DFW Metro Line Services v. Southwestern Bell Telephone Co., 901 F.2d 1267 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 519 (1990).

II. Analysis

Rule 12(b)(6) of the Federal Rules of Civil Procedure empowers a court to dismiss a complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Jamieson by and through Jamieson v. Shaw, 772 F.2d 1205, 1209 (5th Cir. 1985).

In the instant case, Southwestern Bell argues that it is immune from Metro Line's antitrust claims under the state action doctrine. The Supreme Court developed the state action doctrine in Parker v. Brown, 317 U.S. 341 (1943), to protect some state restraints on competition from liability under the Sherman Act. The current test for determining whether the state action doctrine will bar a particular antitrust claim was set out by the Supreme Court in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), and has two parts. First, "the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'"; second, the state must actively supervise any private anti-competitive conduct. 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (citing *Midcal*, 445 U.S. at 105).

In its August 30, 1989 memorandum order, this court applied the *Midcal* test here and concluded that the state action doctrine immunized Southwestern Bell from Metro Line's antitrust claims (Memorandum Order at 5). In its opinion affirming this court's denial of injunctive relief, the Fifth Circuit agreed:

> As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability

> alleged in [Metro Line's] complaint under the "state action" doctrine enunciated in Parker v. Brown, 317 U.S. 341 (1943), as applied to private state-regulated ratemaking by Southern Motor Carriers Rate Conference v. United States, 471 U.S. 48 (1985). Southwestern Bell clearly meets the two-prong test set out in California Retail Dealers Association v. Midcal Aluminum, Inc. 445 U.S. 97 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

DFW Metro Line, 901 F.2d at 1269 n.6.

Nothing in this case has caused the court to alter its previously stated conclusion that the state action doctrine immunizes Southwestern Bell from Metro Line's antitrust claims. Indeed, the recent opinion of the District Court for the Southern District of Florida in Davis v. Southern Bell Telephone & Telegraph Company, 1991 WL 15126 (S.D.Fla. February 4, 1991) (available on WESTLAW) only confirms the correctness of that conclusion. *Davis* involved antitrust claims against Southern Bell, in whose favor the court granted summary judgment on the basis of the state action doctrine.

III. Conclusion

The state action doctrine immunizes Southwestern Bell from Metro Line's antitrust claims. Accordingly, Southwestern Bell's motion to dismiss for failure to state a claim is **GRANTED** and Metro Line's complaint is hereby **DISMISSED** with prejudice.

SO ORDERED.

February 27, 1991.

/s/
A. JOE FISH
United States District Judge

E4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DFW METRO LINE SERVICES,

Plaintiff,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Defendant.

CIVIL ACTION NO.
CA. 3-89-1698-G

JUDGMENT

For the reasons stated in the memorandum order of this date, it is ORDERED that plaintiff take nothing from defendant on its claims in this case.

February 27, 1991.

/s/
A. JOE FISH
United States District Judge

F1

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

DFW Metroline Services, Inc.
Plaintiff-Appellant,

v.

Southwestern Bell Telephone Company,
Defendant-Appellee.

No. 89-1835

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

July 3, 1990

Appeal from the United States District Court for the Northern District of Texas

Before CLARK, Chief Judge, WISDOM and SMITH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on hearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/John Minor Wisdom
United States Circuit Judge

G1

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

DFW Metroline Services,
Plaintiff-Appellant,

v.

Southwestern Bell Telephone Company,
Defendant-Appellee.

No. 89-1835

May 29, 1990

Lessee of telephone lines brought action against competitor lessor seeking injunctive relief on basis of antitrust violations.

The Untied States District Court for the Northern District of Texas, A. Joe Fish, J., denied relief. Lessee appealed. The Court of Appeals held that any potential injuries suffered by lessee could be calculated and recompensed in the form of damages.

Affirmed.

1. Federal Courts 208

Federal court had jurisdiction over action brought by lessee of telephone lines against lessor, although lessor contended that Texas Public Utilities Commission had exclusive original jurisdiction over disputes involving public utility tariffs, where lessee was alleging violation of federal antitrust laws.

2. Monopolies 24(7)

Traditional prerequisites for injunctive relief are applicable to antitrust cases.

3. Monopolies 24(7)

Any potential injury to lessee of telephone lines due to lessor's raising monthly rates, including lessee's going out of business,

could be calculated and recompensed in form of damages; therefore, lessee, which had contended that raising of monthly rates by lessor competitor was a violation of antitrust law, failed to establish irreparable harm and was not entitled to injunctive relief.

4. Monopolies 12(16), 24(7)

Telephone company was immune from antitrust liability alleged in competitor's complaint under "state action" doctrine as applied to private state-regulated rate making, and, therefore, competitor failed to establish likelihood of prevailing on merits of its antitrust claim and was not entitled to injunctive relief.

Ray G. Besing, Ray G. Besing & Associates, Dallas, Tex., for plaintiff-appellant.

Donna Lynn Snyder, Southwestern Bell Telephone Co., Curt Frisbie, Gardere & Wynne, Dallas, Tex., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before CLARK, Chief Judge, and WISDOM and SMITH, Circuit Judges.

PER CURIAM:

I

Plaintiff/appellant DFW Metro Line Services (DFW) offers a form of telephone service (flat-rate calling between Dallas and Forth Worth, sometimes called "metro service") that is also offered by Southwestern Bell (Bell).[1] As part of the equipment for its metro service, DFW uses telephone lines that it leases from Bell. DFW filed suit for injunctive relief or damages after Bell, on June 8, 1989, informed DFW that Bell would discontinue its line leasing to DFW

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[1] A third company, not a party to this case, also offers metro service between Dallas and Fort Worth.

unless DFW began paying Bell much higher monthly rates reflecting "access charges."[2]

Bell's stated reason for requiring DFW to pay higher rates was that the lower rates that DFW had been paying were applicable only to companies using the lines for Radio Common Carrier (RCC) services[3] according to Bell's tariff approved by the Texas Public Utilities Commission (PUC).[4] Bell stated that, to comply with its PUC-approved tariff, it was required to charge DFW the higher rate applicable to the "resale" type of service for which (Bell had just learned[5]) DFW was using the lease lines. DFW argues that Bell's tariff argument is just a sham to cover Bell's real motive to drive out DFW as a competitor in the metro service market.

Discovery in this case proceeded while a temporary restraining order issued by the district court was in effect. Based on the parties' written submissions to the court, the district court on August 30, 1989 filed a Memorandum Order denying DFW's application for preliminary injunction. DFW appeals from that denial.

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[2] The price for use of the lines would rise from approximately $5,000 to approximately $77,000 a month.

[3] RCC services include services such as one-way paging, as distinct from the regular two-way telephone calling involved in metro service.

[4] Southwestern Bell, like other telecommunications common carriers, is required under Texas's Public Utility Regulatory Act (PURA) to file proposed tariffs describing all rates, regulations and services before a service can be offered to the public. PURA § 32. The PUC then must review such rates, regulations and services, and approve the proposed tariff only if its terms are fair and reasonable. PURA §§ 18, 35, 37, 38. An approved tariff has the force and effect of law. Carter v. AT&T Co., 365 F.2d 486, 496 (5th Cir. 1966).

[5] Bell alleges that it had previously understood that DFW was using the lines for one-way paging service.

II

[1] Bell argues that the federal courts do not have jurisdiction over this case because PUC has exclusive original jurisdiction over disputes involving Texas's public utility tariffs. Bell's argument begs the question. DFW's complaint alleges a violation of the federal antitrust laws, an allegation that brings the case within federal jurisdiction. The PUC has exclusive jurisdiction only if Bell is immunized from antitrust liability by the state action doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Whether Bell is thus immunized is a federal question to be litigated in federal court.

III

[2-4] To obtain a preliminary injunction, a movant must show: 1) a substantial likelihood of success on the merits, 2) a substantial threat that irreparable injury will result if the injunction is not granted, 3) that the threatened injury outweighs the threatened harm to the non-movant, and 4) that granting the injunction is not adverse to the public interest. The traditional prerequisites for injunctive relief are applicable to antitrust cases. *See, Mississippi Power & Light Co. v. United States Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985); *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). *See also Phototron Corp. v. Eastman Kodak Co.*, 842 F.2d 95, 98 (5th Cir.) *cert. denied*, 486 U.S. 1023, 108 S.Ct. 1996, 100 L.Ed.2d 228 (1988). The district court in this case found that the plaintiff, DFW, failed to make any of those four showings necessary for a preliminary injunction. Because we agree that DFW failed to make the threshold showing of irreparable injury, we affirm the district court's order.[6]

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[6] As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in DFW's complaint under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as applied to private state-regulated ratemaking by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). Southwestern Bell clearly meets the

There can be no irreparable injury where money damages would adequately compensate a plaintiff. *See Spiegel v. City of Houston*, 636 F.2d 997, 1001 (5th Cir. 1981); *Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975). The lost goodwill of a business operated over a short period of time is usually compensable in money damages.[7] *See Jack Kahn Music Co., Inc. v. Baldwin Piano & Organ Co.*, 604 F.2d 755, 763 (5th Cir. 1979); *Hardin v. Houston Chronicle Publishing Co.*, 426 F.Supp. 1114, 1117-18 (S.D.Tex.1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978). DFW has not shown, nor even argued, that special circumstances in this case would make money damages inadequate should DFW prevail in an adjudication of this case on the merits. The district court correctly observed that, because any potential injury suffered by DFW (including its going out of business) could be calculated and recompensed in the form of damages, DFW did not prove a likelihood of irreparable injury. We therefore AFFIRM the district court's denial of a preliminary injunction in this case.

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two-prong test set out in *California Retail Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

[7] DFW Metro had only been in business for one and a half years at the time this suit was filed.

H1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DFW Metroline Services,

Plaintiff,

vs.

Southwestern Bell Telephone Company,

Defendant.

CIVIL ACTION NO.
CA 3-89-1698-G

MEMORANDUM ORDER

This case is before the court on plaintiff's motion for a preliminary injunction. For the reasons stated below, the court is of the opinion that the motion should be denied.[1]

I. Background

Defendant Southwestern Bell Telephone Company ("Bell") offers its customers Extended Metropolitan Services ("EMS"), which allows them to make unlimited telephone calls throughout the Dallas-Fort Worth metroplex (i.e., across area code boundaries) without incurring long distance charges. EMS is priced on a flat, monthly charge using local telephone lines and telephone numbers. It is this service that is at issue in this case.

The origins of this dispute can be traced back to 1982. At that time, Bell leased phone lines to DFW Communications, a licensed radio common carrier owned by Greg Cunningham ("Cunningham"), for the purpose of providing one way paging. Bell provided these services under the general exchange tariff for RCC-DID service. The rates for RCC-DID service, set by the Texas Public Utilities Commission, are lower than those in the general access tariff. DFW Communications went into bankruptcy during 1987.

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[1] This memorandum will constitute the findings of fact and conclusions of law required by F.R. Civ. P. 52(a).

Cunningham, along with Douglas and Prudence Laird, then formed the plaintiff, DFW Metro Line Services ("DFW"). Using a Northern Telecom switch, DFW could connect its leased phone lines together. In late 1987, DFW began using the liens to offer its "Metro Line" service in direct competition with Bell's EMS. The lines themselves were transferred in May 1988 from DFW to Jim Rucker, a more credit-worth associates of Cunningham. Using the switch program, DFW was providing its service at a price much lower than Bell's EMS.

According to Bell, it did not discover DFW's service until it conducted an audit in late 1988 and early 1989. In any event, by letter of March 9, 1989 Bell objected to DFW's use of the lines to provide metro service. On June 9, 1989, after several discussions, Bell sent DFW a notice of termination, stating that it would terminate service on July 11, 1989. Bell was willing for service to continue if DFW would pay the higher access rate for interexchange carriers as provided in the access service tariff. This higher access rate would, however, correspondingly increase DFW's cost of doing business.

DFW filed this suit on July 6, 1989, alleging claims under the Sherman Antitrust Act, 15 U.S.C. § 2, and seeking injunctive relief under the Clayton Act, 15 U.S.C. § 26. It also alleged a violation of the Texas Public Utility Regulatory Act, Texas Rev. Civ. Stat. Ann. Art. 1446c, § 47, which prohibits discrimination, and a claim of tortious interference. On July 10, 1989, the court granted DFW's motion for a temporary restraining order. DFW now moves for preliminary injunction.

II. Analysis

To obtain a preliminary injunction, a movant must show: (1) a substantial likelihood of success on the merits; (2) a substantial threat that irreparable injury will result if the injunction is not granted; (3) the threatened injury outweighs the threatened harm to the non-movant; and (4) granting the injunction is not adverse to the public interest. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985); *Canal Authority*

of State of Florida v. Callaway, 489 F.2d 567, 572 (5th Cir. 1974). The decision to grant or deny a preliminary injunction is left to the sound discretion of the district court. A preliminary injunction is an extraordinary remedy which should only be granted if the movant has clearly carried its burden of persuasion on all of the four factors. *Mississippi Power & Light*, above, 760 F.2d at 621.

In the Fifth Circuit, the same standard is applied to a motion for a preliminary injunction under the Clayton Act. *Phototron Corporation v. Eastman Kodak Company*, 842 F.2d 95, 98 (5th Cir.) *cert. denied*, ____ U.S.____, 108 S.Ct. 1996 (1988).

A. Substantial Likelihood of Success

DFW has failed to demonstrate a substantial likelihood of success on the merits, a key element in seeking a Clayton Act preliminary injunction. *Phototron*, 842 F.2d at 98.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court held that the Sherman Act was not designed to prohibit states from imposing restraints on competition. *Southern Motor Carriers RAte Conference, Inc. v. United States*, 471 U.S. 48, 55 (1985). While *Parker* involved an action against a state official, it is equally applicable to suits against private parties. *Southern Motor*, 471 U.S. at 56-57; *Woolen v. Surtran Taxicabs, Inc.*, 801 F.2d 159, 163-64 (5th Cir. 1986), *cert. denied*, 480 U.S. 931 (1987).

Nevertheless, *Parker* immunity is not automatic. Rather, the seminal case of *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), set out a two prong test for determining such immunity. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'"; second, the state must actively supervise any private anti-competitive conduct. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, _____, 107 S.Ct. 720, 725 (1987) (citing *Midcal*, 445 U.S. at 105); *Southern Motor Carriers*, 471 at 59 (citing *Midcal*); *Woolen*, 801 F.2d at 163.[2]

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[2] DFW relies on *Sound, Inc. v. American Telephone & Telegraph Company*, 631 F.2d 1324 (8th Cir. 1980). However, as the Eighth Circuit

In the present case, both prongs of the *Midcal* test have been met. The first prong of *Midcal* requires that the activity be undertaken pursuant to a clearly articulated state policy, such as a policy approved by a state legislature. *Southern Motor*, 471 U.S. at 63. A case similar to this one is *Sonitrol of Fresno, Inc. v. American Telephone & Telegraph Company*, 629 F.Supp. 1089 (D.D.C. 1986). There plaintiffs alleged that defendants, American Telephone and the "Baby Bell" companies, manipulated tariffs and restructured pricing to prevent plaintiffs from competing in the remote alarm services market. The court found that the states involved had a clearly articulated policy to regulate telephone rates, as they set the pricing. 629 F.Supp. at 1091-92, 1094.

Texas has clearly articulated a policy to regulate telephone rates. In § 18 of the Public Utility Regulatory Act ("PURA"), Tex.Rev.Civ.Stat. Art. 1446c (Vernon Supp. 1989), the legislature has stated that there is a policy of overseeing the telecommunications industry so as to promote competitiveness, and that the Public Utilities Commission ("PUC") shall regulate all telecommunications rates so as to ensure that they are just, fair, and reasonable. The statute also provides that the PUC shall have exclusive original jurisdiction over the business and property of the telecommunications utilities. *Id.* Moreover, § 18(c)(2) provides that the PUC shall investigate as needed to insure competitiveness within the telecommunications market. Likewise, § 37 provides that the PUC shall set rates, and § 43 states that no utility may make any rate changes unless the PUC approves them. Thus, the challenged activity, namely, the setting of lower rates for RCC-DID service and much higher rates for general access service, has been undertaken pursuant to state policy.[3]

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later explained, *Sound* has been "superseded" by *Southern Motor* and *321 Duffy*. *See Health Care Equalization Committee v. Iowa Medical Society*, 851 F.2d 1020, 1024 (8th Cir. 1988).

[3] IntraLATA, i.e., intrastate RCC services, are governed by the state commission, *See* Bell's Appendix U (Podraza deposition exhibits 2 and 3). Such services are at issue in this case.

DFW appears to suggest that because Bell proposed its tariffs and rate classifications to the PUC, there is no state action. However, it is the PUC which, after investigation, independently makes the ultimate determination.[4]

The second *Midcal* prong requires the state to actively supervise the private anti-competitive conduct. The above-cited sections of the PURA demonstrate active supervision. The PURA invests the PUC with the power to "insure compliance with the obligation of public utilities" under the PURA. Art. 1446c § 37. The PURA fixes and regulates rates, "including rules and regulations for determining the classification of customers and services and for determining the applicability of rates." *Id.* The PUC must insure that any rate made, demanded, or received is just and reasonable. *Id.* § 38. If existing rates are unreasonable or violate any provision of law, the PUC determines the just and reasonable rate after notice and a hearing. *Id.* § 42. As previously stated, the PUC closely oversees any changes in rates, and such rates must be approved by the PUC after a hearing. *Id.* § 43. The burden of proof regarding rates remains at all times on the utility. *Id.* § 40.

Under this Texas regulatory scheme, the PUC actively supervises Bell's conduct.[5] As discussed above, the PUC establishes the rates, which must meet the "just and reasonable" standard. It

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[4] For *Parker* to apply, Texas need not compel the anti-competitive conduct in order but may only permit it. As the Supreme Court stated in *Southern Motor*, "a state policy that may be 'clearly articulated' within the meaning of *Midcal*." 471 U.S. at 61 (emphasis in original). *See also Sonitrol*, 629 F.Supp. at 1094. The PURA evinces a policy which expressly permits the conduct at issue. The PUC regulates the rates and classifications. Utilities may come before it with proposal, but it is the PUC itself which makes the determination after investigation.

[5] The Supreme Court has identified certain factors which demonstrate "active supervision." The state must establish the prices. It must review the reasonableness of prices proposed by private parties. It may not simply authorize the private actors to set prices as they wish, and then merely enforce those prices. *See 324 Liquor Corp.*, 479 U.S. at ____, 107 S.Ct. at 725-26 (discussing *Midcal*, 445 U.S. at 105-06); *Woolen*, 801 F.2d at 164 (same).

reviews and investigates pricing. The PUC closely oversees rate changes, and must alter existing rates which are unreasonable or violative of law.[6]

For these reasons, *Parker* immunity applies to this case. It necessarily follows that DFW has not demonstrated a substantial likelihood of success on the merits.[7]

B. Irreparable Injury

This factor presents a closer question than success on the merits. If DFW does not obtain the injunction sought, it is likely to go out of business, given the much higher general access tariff rate. DFW's business cannot operate without Bell's telephone lines — which is the likely result if DFW is unable to pay the higher general access rate.

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[6] Bell's reasons for proposing the differing classification and rate is not material. The focus of the *Midcal* test "is not on the actions of the defendants before the state commissions but on the states' level of supervision of defendants' anticompetitive conduct." *Sonitrol*, 629 F.Supp. at 1095.

[7] DFW also argues, in Section B-2 of its brief, that federal law preempts state law, noting that its switch has been approved and registered with the Federal Communications Commission. The FCC Rule provides that such terminal equipment may be directly connected to the public switched telephone equipment. 47 C.F.R. Part 68 §68.100. DFW then contends that the FCC, rather than the states, regulates the right to connect to the public switched telephone network. It cites numerous interconnection cases in support of this argument.

The present case, however, does not involve the issue of whether the Northern TElecom switch can be connected to Bell's network. Bell has not disputed the use of such switches. Rather, Bell argues that if DFW is going to use the lines connected to the switch to provide Metroline service, it must pay the access service rates. This distinguishes the cases cited by DFW. *See, e.g., Sound, Inc. v. American Telephone & Telegraph*, 631 F.2d 1324, 1329-30 (8th Cir. 1980) (Bell's prevention of connection of non-Bell equipment to its networks violated Communications Act); *North Carolina Utilities Commission v. Federal Communications Commission*, 537 F.2d 787, 791 (4th CIr.), *cert. denied*, 429 U.S. 1027 (1976) (prevention of such connection violated the Communications Act); *Hush-a-Phone Corporation v. United States*, 238 F.2d 266 (D.D. Cir. 1956) (seminal case holding that prevention of connection violated the Communications Act).

In *Hardin v. Houston Chronicle Publishing Co.*, 434 F.Supp. 54 (S.D. Tex. 1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978), the defendant Chronicle, in anticipation of setting up a new distribution system, gave notice that it was terminating all existing newspaper distributorships. Plaintiffs, two such distributors, sought a preliminary injunction against the termination and new plan, alleging that they violated the antitrust laws. The court nevertheless denied the preliminary injunction because there was no irreparable injury. It held that monetary damages could adequately compensate plaintiffs for their loss:

> Plaintiffs have argued they will suffer irreparable injury if the injunction is not granted. Since the contracts under which plaintiffs were operating their businesses were terminable at will by either party on fifteen days' notice and there was no discrimination in the terminations, the terminations were a foreseeable risk of doing business. The Court, therefore, finds that the plaintiffs have failed to show irreparable injury. *Id.*

434 F.Supp. at 57.

The court came to a like conclusion in *Hardin v. Houston Chronicle Publishing Co.*, 426 F.Supp. 1114 (S.D. Tex. 1977), *aff'd* 572 F.2d 1106 (1978). Plaintiffs argued that their terminations, if not enjoined, would result in permanent loss of customers, as well as loss of their distributorship. The court concluded that these losses would not per se constitute irreparable injury. Rather, plaintiffs were required to show that the loss could not be measured in money damages. 426 F.Supp. at 1117-8. The Fifth Circuit affirmed the trial court's decision in both cases, finding that plaintiffs had not demonstrated irreparable injury. 572 F.2d at 1108.

DFW has not shown irreparable injury in this case. Like the distributors in *Hardin*, it has argued merely that it will be put out of business, losing customers and good will. Like those distributors, it has made no showing that monetary damages would be inadequate. Rather, DFW has simply asserted that irreparable injury will per se result from denial of the injunction. This is

insufficient under *Hardin*. Moreover, as in *Hardin*, 434 F.Supp. 54, the contract at issue here was terminable at will, so that termination was a foreseeable risk.

C. Balancing the Equities

As noted above, denial of the injunction may very well cause DFW to cease operation. On the other hand, if Bell is compelled to continue service at the RCC-DID rate, it will earn less money than if DFW paid the general access rate and may not be able to recover those moneys from DFW if it prevails on the merits. Although it is debatable which of these is a greater hardship, a preliminary injunction is not warranted because DFW has not clearly carried its burden of persuasion on this factor, as well as on those above.

D. Public Interest

This factor is essentially neutral.

III Conclusion

DFW has failed to meet its burden on a motion for a preliminary injunction. Therefore, the motion is DENIED.

SO ORDERED.

August 30, 1989.

/s/_____
A. JOE FISH
United States District Judge

U.S. Constitution, Art. VI, cl. 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Sherman Antitrust Act, 15 U.S.C.S. §§ 2 and 15(a)

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine to conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured

(a) Amount of recovery, prejudgment interest. Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's repre-

sentative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Art. 1446c. Public Utility Regulatory Act

ARTICLE I. SHORT TITLE, LEGISLATIVE POLICY, AND DEFINITIONS

Short title

Section 1. This Act may be referred to as the "Public Utility Regulatory Act."

Legislative policy and purpose

Sec. 2. This Act is enacted to protect the public interest inherent in the rates and services of public utilities. The legislature finds that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in a free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies, with the objective that such regulation shall operate as a substitute for such competition. The purpose of this Act is to establish a comprehensive regulatory system which is adequate to the task of regulating public utilities as defined by this Act, to assure rates, operations, and services which are just and reasonable to the consumers and to the utilities.

Definitions

Sec. 3. (a) The term "person," when used in this Act, includes natural persons, partnerships of two or more persons having a joint or common interest, mutual. or cooperative associations, water supply or sewer service corporations, and corporations, as herein defined.

(b) The term "municipality," when used in this Act, includes cities and incorporated villages or towns existing, created, or organized under the general, home-rule, or special laws of the state.

(c) The term "public utility" or "utility," when used in this Act, includes any person, corporation, river authority, cooperative corporation, or any combination thereof, other than a municipal corporation or a water supply or sewer service corporation, or their

lessees, trustees, and receivers, now or hereafter owning or operating for compensation in this state equipment or facilities for:

(1) producing, generating, transmitting, distributing, selling, or furnishing electricity ("electric utilities" hereinafter) provided, however, that this definition shall not be construed to apply to or include a qualifying small power producer or qualifying cogenerator, as defined in Sections 3(17)(D) and 3(18)(C) of the Federal Power Act, as amended (16 U.S.C. Sections 796(17)(D) and 796(18)(C));

(2)(A) the conveyance, transmission, or reception of communications over a telephone system as a dominant carrier as hereinafter defined ("telecommunications utilities" hereinafter); provided that no person or corporation not otherwise a public utility within the meaning of this Act shall be deemed such solely because of the furnishing or furnishing and maintenance of a private system or the manufacture, distribution, installation, or maintenance of customer premise communications equipment and accessories; and provided further that nothing in this Act shall be construed to apply to telegraph services, television stations, radio stations, community antenna television services, or radio-telephone services that may be authorized under the Public Mobile Radio Services rules of the Federal Communications Commission, other than such radio-telephone services provided by wire-line telephone companies under the Domestic Public Land Mobile Radio Service and Rural Radio Service rules of the Federal Communications Commission; and provided further that interexchange telecommunications carriers (including resellers of interexchange telecommunications services), specialized communications common carriers, other resellers of communications, other communications carriers who convey, transmit, or receive communications in whole or in part over a telephone system, and providers of operator services as defined in Section 18A(a) of this Act (except that subscribers to customer-owned pay telephone service shall not be deemed to be telecommunications utilities) who are not dominant carriers are also telecommunications utilities, but the commission's regulatory authority as to them is only as hereinafter defined;

(B) "dominant carrier" when used in this Act means (i) a provider of any particular communication service which is provided in whole or in part over a telephone system who as to such service has sufficient market power in a telecommunications market as determined by the commission to enable such provider to control prices in a manner adverse to the public interest for such service in such market; and (ii) any provider of local exchange telephone service within a certificated exchange area as to such service. A telecommunications market shall be statewide until January 1, 1985. After this date .the commission may, if it determines that the public interest will be served, establish separate markets within the state. Prior to January 1, 1985, the commission shall hold such hearings and require such evidence as is necessary to carry out the public purpose of this Act and to determine the need and effect of establishing separate markets. Any such provider determined to be a dominant carrier as to a particular telecommunications service in a market shall not be presumed to be a dominant carrier of a different telecommunications service in that market.

(3) The term "public utility" or "utility" shall not include any person or corporation not otherwise a public utility that furnishes the services or commodity described in any paragraph of this subsection only to itself, its employees, or tenants as an incident of such employee service or tenancy, when such service or commodity is not resold to or used by others. The term "electric utility" shall not include any person or corporation not otherwise a public utility that owns or operates in this state equipment or facilities for producing, generating, transmitting, distributing, selling, or furnishing electric energy to an electric utility, if the equipment or facilities are used primarily for the production and generation of electric energy for consumption by the person or corporation. The term "public utility," "utility," or "electric utility" shall not include any person or corporation not otherwise a public utility that owns or operates in this state a recreational vehicle park that provides metered electric service in accordance with Article 1446d-2, Revised Statutes. A recreational vehicle park owner is considered

a public utility if the owner fails to comply with Article 1446d-2, Revised Statutes, with regard to the metered sale of electricity at the recreational vehicle park.

(d) The term "rate," when used in this Act, means and includes every compensation, tariff, charge, fare, toll, rental, and classification, or any of them demanded, observed, charged, or collected whether directly or indirectly by any public utility for any service, product, or commodity described in Subdivision (e) of this section, and any rules, regulations, practices, or contracts affecting any such compensation, tariff, charge, fare, toll, rental, or classification.

(e) The word "commission," when used in this Act, means the Public Utility Commission of Texas, as hereinafter constituted.

(f) Repealed by Acts 1983, 68th Leg., p. 1222, eh. 263, § 25, eff. Sept. 1, 1983.

(g) The term "regulatory authority," when used in this Act, means, in accordance with the context where it is found, either the commission or the governing body of any municipality.

(h) "Affected person" means any public utility affected by any action of the regulatory authority, any person or corporation whose utility service or rates are affected by any proceeding before the regulatory authority, or any person or corporation that is a competitor of a public utility with respect to any service performed by the utility or that desires to enter into competition.

(i) "Affiliated interest" or "affiliate" means:

(1) any person or corporation owning or holding, directly or indirectly, five percent or more of the voting securities of a public utility;

(2) any person or corporation in any chain of successive ownership of five percent or more of the voting securities of a public utility;

(3) any corporation five percent or more of the voting securities of which is owned or controlled, directly or indirectly, by a public utility;

(4) any corporation five percent or more of the voting securities of which is owned or controlled, directly or indirectly, by any person or corporation that owns or controls, directly or indirectly, five percent or more of the voting securities of any public utility or by any person or corporation in any chain of successive ownership of five percent of such securities;

(5) any person who is an officer or director of a public utility or of any corporation iii any chain of successive ownership of five percent or more of voting securities of a public utility;

(6) any person or corporation that the commission, after notice and hearing, determines actually exercises any substantial influence or control over the policies and actions of a public utility, or over which a public utility exercises such control, or that is under common control with a public utility, such control being the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of another, whether such power is established through ownership or voting of securities or by any other direct or indirect means; or

(7) any person or corporation that the commission after notice and hearing determines is actually exercising such substantial influence over the policies and action of the public utility in conjunction with one or more persons or corporations with which they are related by ownership or blood relationship, or by action in concert, that together they are affiliated with such public utility within the meaning of this section, even though no one of them alone is so affiliated.

(j) "Allocations" means, for all utilities, the division of plant, revenues, expenses, taxes, and reserves between municipalities or between municipalities and unincorporated areas, where such items are used for providing public utility service in a municipality, or for a municipality and unincorporated areas.

(k) "Commissioner" means a member of the Public Utility Commission of Texas.

(l) "Cooperative corporation" means any telephone or electric cooperative corporation organized and operating under the Telephone Cooperative Act (Article 1528c, Vernon's Texas Civil Statutes) or the Electric Cooperative Corporation Act (Article 1528b, Vernon's Texas Civil Statutes).

(m) "Corporation" means any corporation, joint-stock company, or association, domestic or foreign, and its lessees, assignees, trustees, receivers, or other successors in interest, having any of the powers or privileges of corporations not possessed by individuals or partnerships, but shall not include municipal corporations unless expressly provided otherwise in this Act.

(n) "Facilities" means all the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any public utility.

(o) "Municipally-owned utility" means any utility owned, operated, and controlled by a municipality or by a nonprofit corporation whose directors are appointed by one or more municipalities.

(p) "Order" means the whole or a part of the final disposition, whether affirmative, negative, injunctive, or declaratory in form, of the regulatory authority in a matter other than rulemaking, but including issuance of certificates of convenience and necessity in ratesetting.

(q) "Proceeding" means any hearing, investigation, inquiry, or other fact-finding or decision-making procedure under this Act and includes the denial of relief or the dismissal of a complaint.

(r) "Separation" means, for communications utilities only, the division of plant, reveues, expenses, taxes, and reserves, applicable to exchange or local service where such items are used in common for providing public utility service to both local exchange service and other service, such as interstate or intrastate toll service.

(s) "Service" is used in this Act in its broadest and most inclusive sense, and includes any and all acts done, rendered, or performed and any and all things furnished or supplied, and any and all facilities used, furnished, or supplied by public utilities in the performance of their duties under this Act to their patrons, employees, other public utilities, and the public, as well as the interchange of facilities between two or more of them. Service shall not include the printing, distribution, or sale of advertising in telephone directories.

(t) "Test year" means the most recent 12 months for which operating data for a public utility are available and shall commence with a calendar quarter or a fiscal year quarter.

(u) "Water supply or sewer service corporation" means a nonprofit, member-owned corporation organized and operating under Chapter 76, Acts of the 43rd Legislature, 1st Called Session, 1933, as amended (Article 1434a, Vernon's Texas Civil Statutes).

(v) "Local exchange company" means a telecommunications utility certificated to provide local exchange service within the state.

Applicability of Administrative Procedure and Texas Register Act

Sec. 4. The Administrative Procedure and Texas Register Act applies to all proceedings under this Act except to the extent inconsistent with this Act. Communications of members and employees of the commission with a party, a party's representative, or other persons are governed by Section 17 of that Act.

ARTICLE II. ORGANIZATION OF COMMISSION; OFFICE OF PUBLIC UTILITY COUNSEL

Creation of commission; appointment and terms; chairman

Sec. 5. A commission, to be known as the "Public Utility Commission of Texas" is hereby created. It shall consist of three commissioners, who shall be appointed to staggered, six-year terms by the governor, with the advice and consent of two-thirds of the

members of the senate present, and who shall have and exercise the *jurisdiction and* powers herein conferred upon the commission. Each commissioner shall hold office until his successor is appointed and qualified. At its first meeting following the biennial appointment and qualification of a commissioner, the commission shall elect one of the commissioners chairman. Appointments to the commission shall be made without regard to the race, creed, sex, religion, or national origin of the appointees.

Application of Sunset Act

Sec. 5a. The Public Utility Commission of Texas and the Office of Public Utility Counsel are subject to Chapter 325, Government Code (Texas Sunset Act). Unless continued in existence as provided by that chapter, the commission and the Office of Public Utility Counsel are abolished and this Act expires September 1, 1993.

Qualifications; oath and bond; prohibited activities

Sec. 6. (a) To be eligible for appointment as a commissioner, a person must be a qualifies voter, not less than 30 years of age, a citizen of the United States, and a resident of the State of Texas. No person is eligible for appointment as a commissioner if at any time during the two-year period immediately preceding his appointment he personally served as an officer, director, owner, employee, partner, or legal representative of any public utility or any affiliated interest, or he owned or controlled, directly or indirectly, stocks or bonds of any class with a value of $10,000, or more in a public utility or any affiliated interest. Each commissioner shall qualify for office by taking the oath prescribed for other state officers and shall execute a bond for $5,000 payable to the state and conditioned on the faithful performance of his duties. A person who is required to register as a lobbyist under Chapter 305, Government Code, may not serve as a member of the commission or public utility counsel or act as the general counsel to the commission.

(b) No commissioner or employee of the commission may do any of the following during his period of service with the commission:

(1) have any pecuniary interest, either as an officer, director, partner, owner, employee, attorney, consultant, or otherwise, in any public utility or affiliated interest, or in any person or corporation or other business entity a significant portion of whose business consists of furnishing goods or services to public utilities or affiliated interests, but not including a nonprofit group or association solely supported by gratuitous contributions of money, property or services

(2) own or control any securities in a public utility or affiliated interest, either directly or indirectly;

(3) accept any gift, gratuity, or entertainment whatsoever from any public utility or affiliated interest, or from any person, corporation, agent, representative, employee, or other business entity a significant portion of whose business consists of furnishing goods or services to public utilities or affiliated interests, or from any agent, representative, attorney, employee, officer, owner, director, or partner of any such business entity or of any public utility or affiliated interest; provided, however, that the receipt and acceptance of any gifts, gratuities, or entertainment after termination of service with the commission whose cumulative value in any one-year period is less than $100 shall not constitute a violation of this Act.

(c) The prohibited activities of this section do not include contracts for public utility products and services or equipment for use of public utility products when a member or employee of the commission is acting as a consumer.

(d) No commissioner or employee of the commission may directly or indirectly solicit or request from or suggest or recommend to, any public utility, or to any agent, representative, attorney, employee, officer, owner, director, or partner thereof, the appointment to any position or the employment in any capacity of any person by such public utility or affiliated interest.

(e) No public utility or affiliated interest or any person, corporation, firm, association, or business that furnishes goods or services to any public utility or affiliated interest, nor any agent, representative, attorney, employee, officer, owner, director, or partner of ally public utility or affiliated interest, or any person, corporation, firm, association, or business furnishing goods or services to any public utility or affiliated interest may give, or offer to give, any gift, gratuity, employment, or entertainment whatsoever to any member or employee of the commission except as allowed by Subdivision (3) of Subsection (b) of this section, nor may any such public utility or affiliated interest or any such person, corporation, firm, association, or business aid, abet, or participate with any member, employee, or former employee of the commission in any activity or conduct that would constitute a violation of this subsection or Subdivision (3) of Subsection (b) of this section.

(f) It shall not be a violation of this section if a member of the commission or a person employed by the commission, upon becoming the owner of any stocks or bonds or other pecuniary interest in a public utility or affiliated interest under the jurisdiction of the commission otherwise than voluntarily, informs the commission and the attorney general of such ownership and divests himself of the ownership or interest within a reasonable time. In this section, a "pecuniary interest" includes income, compensation and payment of any kind, in addition to ownership interests. It is not a violation of this section if such a pecuniary interest is held indirectly by ownership of an interest in a retirement system, institution, or fund which in the normal course of business invests in diverse securities independently of the control of the commissioner or employee.

(g) Repealed by Acts 1987, 70th Leg., eh. 150, § 3, eff. Aug. 31, 1987.

(h) No member of the commission may seek nomination or election to any other civil office of the State of Texas or of the United States while he is a commissioner. If any member of the commission files for nomination for or election to any civil office

of the State of Texas or of the United States, his office as commissioner immediately becomes vacant, and the governor shall appoint a successor.

(i) No commissioner shall within two years, and no employee shall, within one year after his employment with the commission has ceased, be employed by a public utility which was in the scope of the commissioner's or employee's official responsibility while the commissioner or employee was associated with the commission.

(j) During the time a commissioner or employee of the commission is associated with the commission or at any time after, the commissioner or employee may not represent a person, corporation, or other business entity before the commission or a court in a matter in which the commissioner or employee was personally involved while associated with the commission or a matter that was within the commissioner's or employee's official responsibility while the commissioner or employee was associated with the commission.

(k) The commission shall require its members and employees to read this section and as often as necessary shall provide information regarding their responsibilities under applicable laws relating to standards of conduct for state officers and employees.

Grounds for removal; validity of actions

Sec. 6A. (a) It is a ground for removal from the commission if a member:

(1) does not have at the time of appointment the qualifications required by Section 6 of this Act for appointment to the commission; or

(2) does not maintain during the service on the commission the qualifications required by Section 6 of this Act for appointment to the commission.

(b) The validity of an action of the commission is not affected by the fact that it was taken when a ground for removal of a member of the commission existed.

Vacancies

Sec. 7. Whenever a vacancy in the office of commissioner occurs, it shall be filled in the manner provided herein with respect to the original appointment, except that the governor may make interim appointments to continue until the vacancy can be filled in the manner provided. Any person appointed with the advice and consent of the senate to fill a vacancy shall hold office during the unexpired portion of the term.

Employees

Sec. 8. (a) The commission shall employ such officers, administrative law judges, hearing examiners, investigators, lawyers, engineers, economists, consultants, statisticians, accountants, administrative assistants, inspectors, clerical staff, and other employees as it deems necessary to carry out the provisions of this Act. All employees receive such compensation as is fixed by the legislature.

(b) The commission shall employ the following:

(1) an executive director,

(2) a director of hearings who has wide experience in utility regulation and rate determination;

(3) a chief engineer who is a registered engineer and an expert in public utility engineering and rate matters;

(4) a chief accountant who is a certified public accountant, experienced in public utility accounting;

(5) a director of research who is experienced in the conduct of analyses of industry, economics, energy, fuel, and other related matters that the commission may want to undertake;

(6) a director of consumer affairs and public information;

(7) a director of utility evaluation;

(8) a director of energy conservation; and

(9) a general counsel.

(c) The general counsel and his staff are responsible for the gathering of information relating to all matters within the authority of the commission.

The duties of the general counsel include:

(1) accumulation of evidence and other information from public utilities and from the accounting and technical and other staffs of the commission and from other sources for the purposes specified herein;

(2) preparation and presentation of such evidence before the commission or its appointed examiner in proceedings;

(3) conduct of investigations of public utilities under the jurisdiction of the commission;

(4) preparation of proposed changes in the rules of the commission;

(5) preparation of recommendations that the commission undertake investigation of any matter within its authority;

(6) preparation of recommendations and a report of such staff for inclusion in the annual report of the commission;

(7) protection and representation of the public interest and coordination and direction of the preparation and presentation of evidence from the commission staff in all cases before the commission as necessary to effect the objectives and purposes stated iii this Act and ensure protection of the public interest; and

(8) such other activities as are reasonably necessary to enable him to perform his duties.

(d) The commission shall employ administrative law judges to preside at hearings of major importance before the commission. An administrative law judge must be a licensed attorney with not less than five years' general experience or three years' experience in utility regulatory law. The administrative law judge shall perform his duties independently from the commission.

(e) The executive director or his designee shall develop an intraagency career ladder program, one part of which shall be the

intraagency posting of all non-entry level positions for at least 10 days before any public posting. The executive director or his designee shall develop a system of annual performance evaluations based on measurable job tasks. All merit pay for commission employees must be based on the system established under this section.

(f) The executive director or his/her designee shall prepare and maintain a written plan to assure implementation of a program of equal employment opportunity whereby all personnel transactions are made without regard to race, color, disability, sex, religion, age, or national origin. The plans shall include:

(1) a comprehensive analysis of all the agency's work force by race, sex, ethnic origin, class of position, and salary or wage;

(2) plans for recruitment, evaluation, selection, appointment, training, promotion, and other personnel policies;

(3) steps reasonably designed to overcome any identified underutilization of minorities and women in the agency's work force; and

(4) objectives and goals, timetables for the achievement of the objectives and goals, and assignments of responsibility for their achievement.

The plans shall be filed with the governor's office within 60 days of the effective date of this Act, cover an annual period, and be updated at least annually. Progress reports shall be submitted to the governor's office within 30 days of November 1 and April 1 of each year and shall include the steps the agency has taken within the reporting period to comply with these requirements.

Salary

Sec. 9. The annual salary of the commissioners shall be determined by the legislature.

Office; meetings

Sec. 10. The principal office of the commission shall be located in the City of Austin, Texas, and shall be open daily during

the usual business hours, Saturdays, Sundays, and legal holidays excepted. The commission shall hold meetings at its office and at such other convenient places in the state as shall be expedient and necessary for the proper performance of its duties.

Seal

Sec. 11. The commission shall have a seal bearing the following inscription: "Public Utility Commission of Texas." The seal shall be affixed to all records and authentications of copies of records and to such other instruments as the commission shall direct. All courts of this state shall take judicial notice of said seal.

Quorum

Sec. 12. A majority of the commissioners shall constitute a quorum for the transaction of any business, for the performance of any duty, or for the exercise of any power of the commission. No vacancy or disqualification shall prevent the remaining commissioner or commissioners from exercising all the powers of the commission.

Orders; transcript and exhibits; public records

Sec. 13. All orders of the commission shall be in writing and shall contain detailed findings of the facts upon which they are passed. The commission shall retain a copy of the transcript and the exhibits in any matter in which the commission issues an order. All files pertaining to matters which were at any time pending before the commission and to records, reports, and inspections required by Article V hereof shall be public records, .subject to the terms of the Texas Open Records Act, Chapter 424, Acts of the 63rd Legislature, Regular Session, 1973, as amended (Article 6252-17a, Vernon's Texas Civil Statutes).

Annual report

Sec. 14. (a) The commission shall publish an annual report to the governor, summarizing its proceedings, listing its receipts and the sources of its receipt.9, listing its expenditures and the nature of such expenditures, and setting forth such other informa-

tion concerning the operations of the commission and the public utility industry as it considers of general interest.

(b) In the annual report issued in the year preceding the convening of each regular session of the legislature, the commission shall make such suggestions regarding modification and improvement of the commission's statutory authority and for the improvement of utility regulation in general as it may deem appropriate for protecting and furthering the interest of the public.

Consumer information

Sec. 14A. The commission shall prepare information of consumer interest describing the regulatory functions of the commission and describing the commission's procedures by which consumer complaints are filed with and resolved by the commission. The commission shall make the information available to the general public and appropriate state agencies.

Attorney General to represent commission

Sec. 15. The Attorney General of the State of Texas shall represent the commission in all matters before the state courts, and any court of the United States, and before any federal public utility regulatory commission.

Office of Public Utility Counsel

Sec. 15A. (a) The independent Office of Public Utility Counsel is hereby established to represent the interests of residential and small commercial consumers.

(b) The chief executive of the Office of Public Utility Counsel is the public utility counsel, hereinafter referred to as counsellor. The counsellor is appointed by the governor with the advice and consent of the senate to a two-year term that expires on February 1 of the final year of the term. Immediately after this section takes effect, the governor shall, with the advice and consent of the senate, appoint the public utility counsel.

(c) The counsellor may employ such lawyers, economists, engineers, consultants, statisticians, accountants, clerical staff, and

other employees as he or she deems necessary to carry out the provisions of this section. All employees shall receive such compensation as is fixed by the legislature from the assessment imposed by Section 78 of this Act.

(d) The counsellor shall be a resident of Texas and admitted to the practice of law in this state who has demonstrated a strong commitment and involvement in efforts to safeguard the rights of t.he public and possesses the knowledge and experience necessary to practice effectively in utility proceedings.

(e) During the period of the counsellor's employment and for a period of two years following the termination of employment, it shall be unlawful,for any person employed as counsellor to have a direct or indirect interest in any utility company regulated under the Public Utility Regulatory Act, to provide legal services directly or indirectly to or be employed in any capacity by a utility company regulated under the Public Utility Regulatory Act, its parent, or its subsidiary companies, corporations, or cooperatives; but such person may otherwise engage in the private practice of law after the termination of employment as the counsellor.

(f) The Office of Public Utility Counsel:

(1) shall assess the impact of utility rate changes and other regulatory actions on residential consumers in the State of Texas and shall be an advocate in its own name of positions most advantageous to a substantial number of such consumers as determined by the counsellor;

(2) may appear or intervene as a matter of right as a party or otherwise on behalf of residential consumers, as a class, in all proceedings before the commissions;

(3) may appear or intervene as a matter of right as a party or otherwise on behalf of small commercial consumers, as a class, in all proceedings where it is deemed by the counsel that small commercial consumers are in need of representation.

(4) may initiate or intervene as a matter of right or otherwise appear in any judicial proceedings involving or arising out of any

action taken by an administrative agency in a proceeding in which the counsel was authorized to appear;

(5) may have access as any party, other than staff, to all records gathered by the commission under the authority of Subsection (a) of Section 29 of this Act;

(6) may obtain discovery of any nonprivileged matter which is relevant to the subject matter involved in any proceeding or petition before the commission;

(7) may represent individual residential and small commercial consumers with respect to their disputed complaints concerning utility services unresolved before the commission; and

(8) may recommend legislation to the legislature which in its judgment would positively affect the interests of residential and small commercial consumers.

(g) Nothing in this section shall be construed as in any way limiting the authority of the commission -to represent residential or small commercial consumers.

(h) The appearance of the Public Counsel in any proceeding in no way precludes the appearance of other parties on behalf of residential ratepayers or small commercial consumers. The Public Counsel shall not be grouped with any other parties.

(i) There shall be only one Office of Public Utility Counsel even though that office may be referenced in one or more Acts of the 68th Legislature.

ARTICLE III. JURISDICTION

General power; rules; hearings; statewide and utility electrical energy forecasts; reports; audits

Sec. 16. (a) The commission has the general power to regulate and supervise the business of every public utility within its jurisdiction and to do all things, whether specifically designated in this Act or implied herein, necessary and convenient to the exercise of this power and jurisdiction. The commission shall make and enforce rules reasonably required in the exercise of its powers and

jurisdiction, including rules governing practice and procedure before the commission. The commission may call and hold hearings, administer oaths, receive evidence at hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to administering the provisions of this Act or the rules, orders, or other actions of the commission. Notwithstanding any other provision of this Act or other law, in proceedings other than those involving major rate changes, the commission may delegate to an administrative law judge or hearings examiner the authority to make a final decision and to issue findings of fact, conclusions of law, and other necessary orders in a proceeding in which there is no contested issue of fact or law. The commission, by rule, shall define the procedures by which it delegates final decision making authority authorized by this section. For review purposes the final decision of the administrative law judge or hearing examiner has the same effect as a final decision of the commission unless a commissioner requests formal review of the decision.

(b) The commission shall develop a long-term statewide electrical energy forecast which shall be sent to the governor biennially. The forecast will include an assessment of how alternative energy sources, conservation, and load management will meet the state's electricity needs.

(c) Every generating electric utility in the state shall prepare and transmit to the commission by December 31, 1983, and every two years thereafter a report specifying at least a 10-year forecast for assessments of load and resources for its service area. The report shall include a list of facilities which will be required to supply electric power during the forecast periods. The report shall be in a form prescribed by the commission.

The report shall include:

(1) a tabulation of estimated peak load, resources, and reserve margins for each year during the forecast or assessment period;

(2) a list of existing electric generating plants in service with a description of planned and potential generating capacity at existing sites;

(3) a list of facilities which will be needed to serve additional electrical requirements identified in the forecasts or assessments, the general location of such facilities, and the anticipated types of fuel to be utilized in the proposed facilities, including an estimation of shutdown costs and disposal of spent fuel for nuclear power plants;

(4) a description of additional system capacity which might be achieved through, among other things, improvements in (A) generating or transmission efficiency, (B) importation of power, (C) interstate or interregional pooling, (D) other improvements in efficiencies of operation; and (E) conservation measures;

(5) an estimation of the mix and type of fuel resources for the forecast or assessment period;

(6) an annual load duration curve and a forecast of anticipated peak loads for the forecast or assessment period for the residential, commercial, industrial, and such other major demand sectors in the service area of the electric utility as the commission shall determine; and

(7) a description of projected population growth, urban development, industrial expansion, and other growth factors influencing increased demand for electric energy and the basis for such projections.

(d) The commission shall establish and every electric utility shall utilize a reporting methodology for preparation of the forecasts of future load and resources.

(e) The commission shall review and evaluate the electric utilities' forecast of load Ind resources and any public comment on population growth estimates prepared by Bureau of Business Research, University of Texas at Austin.

(f) Within 12 months after the receipt of the reports required in Subsection (b) I of this section, the commission shall hold a

public hearing and subsequently issue a final report to the governor and notify every electric utility of the commission's electric forecast for that utility. The commission shall consider its electric forecast in all certification proceedings covering new generation plant.

(g) The commission shall make and enforce rules to encourage the economical production of electric energy by qualifying cogenerators and qualifying small power producers.

(h) The commission shall inquire into the management of the business of all public utilities under its jurisdiction, shall keep itself informed as to the manner and method in which the management and business is conducted, and shall obtain from any public utility all necessary information to enable the commission to perform management audits. The commission may audit each utility under the jurisdiction of the commission as frequently as needed, but shall audit each utility at least once every 10 years. Six months after any audit the utility shall report to the commission on the status of the implementation of the recommendations of the audit and shall file subsequent reports at such times as the commission deems appropriate.

Jurisdiction of municipality; surrender, original and appellate jurisdiction of commission

Sec. 17. (a) Subject to the limitations imposed in this Act, and for the purpose of regulating rates and services so that such rates may be fair, just, and reasonable, and the services adequate and efficient, the governing body of each municipality shall have exclusive original jurisdiction over all electric, water, and sewer utility rates, operations, and services provided by an electric, water, and sewer utility within its city or town limits.

(b) At any time after two years have passed from the date this Act becomes effective, a municipality may elect to have the commission exercise exclusive original jurisdiction over electric, water, or sewer utility rates, operations, and services within the incorporated limits of the municipality. The governing body of a

municipality may by ordinance elect to surrender its original jurisdiction to the commission, or the governing body may submit the question of the surrender to the qualified voters at a municipal election. Upon receipt of a petition signed by the lesser of 20,000 or ten percent of the number of qualified voters voting in the last preceding general election in that municipality, the governing body shall submit the question of the surrender of the municipality's original jurisdiction to the commission at a municipal election.

(c) A municipality that surrenders its jurisdiction to the commission may at any time, by vote of the electorate, reinstate the jurisdiction of the governing body; provided, however, that any municipality which reinstates its jurisdiction shall be unable to surrender that jurisdiction for five years after the date of the election at which the municipality elected to reinstate its jurisdiction. No municipality may, by vote of the electorate, reinstate the jurisdiction of the governing body during the pendency of any case before the commission involving the municipality.

(d) The commission shall have exclusive appellate jurisdiction to review orders or ordinances of such municipalities as provided in this Act.

(e) The commission shall have exclusive original jurisdiction over electric, water, and sewer utility rates, operations, and services not within the incorporated limits of a municipality exercising exclusive original jurisdiction over those rates, operations, and services as provided in this Act.

Telecommunications utilities; regulation of competition

Sec. 18. (a) It is the policy of this state to protect the public interest in having adequate and efficient telecommunications service available to all citizens of the state at just, fair, and reasonable rates. The legislature finds that the telecommunications industry through technical advancements, federal judicial and administrative actions, and the formulation of new telecommunications enterprises has become and will continue to be in many and growing areas a competitive industry which does not lend itself to

traditional public utility regulatory rules, policies, and principles; and that therefore, the public interest requires that new rules, policies, and principles be formulated and applied to protect the public interest and to provide equal opportunity to all telecommunications utilities in a competitive marketplace. It is the purpose of this section to grant to the commission the authority and the power under this Act to carry out the public policy herein stated.

(b) Subject to the limitations imposed in this Act, and for the purpose of carrying out the public policy above stated and of regulating rates, operations, and services so that such rates may be just, fair, and reasonable, and the services adequate and efficient, the commission shall have exclusive original jurisdiction over the business and property of all telecommunications utilities in this state. In the exercise of its jurisdiction to regulate the rates, operations, and services of a telecommunications utility providing service in a municipality on the state line adjacent to a municipality in an adjoining state, the commission may cooperate with the utility regulatory commission of the adjoining state or the federal government and may hold joint hearings and make joint investigations with any of those commissions.

(c) Except as provided by Section 18A of this Act, the commission shall only have the following jurisdiction over all telecommunications utilities who are not dominant carriers:

(1) to require registration as provided in Subsection (d) of this section;

(2) to conduct such investigations as are necessary to determine the existence, impact, and scope of competition in the telecommunications industry, including identifying dominant carriers and defining the telecommunications market or markets, and in connection therewith may call and hold hearings, issue subpoenas to compel the attendance of witnesses and the production of papers and documents, and make findings of fact and decisions with respect to administering the provisions of this Act or the rules, orders, and other actions of the commission;

(3) to require the filing of such reports as the commission may direct from time to time;

(4) to require the maintenance of statewide average rates or prices of telecommunications service;

(5) to require that every local exchange area have access to interexchange telecommunications service, except that an interexchange telecommunications carrier must be allowed to discontinue service to a local exchange area if comparable service is available in the area and the discontinuance is not contrary to the public interest. This section does not authorize the commission to require an interexchange telecommunications carrier that has not provided services to a local exchange area during the previous 12 months and that has never provided services to that same local exchange area for a cumulative period of one year at any time in the past to initiate services to that local exchange area; and

(6) to require the quality of interexchange telecommunications service provided in each exchange to be adequate to protect the public interest and the interests of customers of that exchange if the commission determines that service to a local exchange has deteriorated to the point that long distance service is not reliable.

(d) All providers of communications service described in Subsection (e) of this section who are providing such service to the public on the effective date of this Act shall register with the commission within 90 days of the effective date of this Act. All providers of communications service described in Subsection (e) of this section who commence such service to the public thereafter shall register with the commission within 30 days of commencing service. Such registration shall be accomplished by filing with the commission a description of the location and type of service provided, the cost to the public of such service, and such other registration information as the commission may direct. Notwithstanding any other provision of this Act, an interexchange telecommunications carrier doing business in this state shall continue to maintain on file with the commission tariffs or lists governing the terms of providing its services.

(e)(1) For the purpose of carrying out the public policy stated in Subsection (a) of this section and any other section of this Act notwithstanding, the commission is granted all necessary power and authority under this Act to promulgate rules and establish procedures applicable to local exchange companies for determining the level of competition in specific telecommunications markets and submarkets and providing appropriate regulatory treatment to allow local exchange companies to respond to significant competitive challenges. Nothing in this section is intended to change the burden of proof of the local exchange company under Sections 38, 39, 40, and 41 of Article VI of this Act.

(2) In determining the level of competition in a specific market or submarket, the commission shall hold an evidentiary hearing to consider the following:

(A) the number and size of telecommunications utilities or other persons providing the same, equivalent, or substitutable service;

(B) the extent to which the same, equivalent, or substitutable service is available;

(C) the ability of customers to obtain the same, equivalent, or substitutable services at comparable rates, terms, and conditions;

(D) the ability of telecommunications utilities or other persons to make the same, equivalent, or substitutable service readily available at comparable rates, terms, and conditions;

(E) the existence of any significant barrier to the entry or exit of a provider of the service; and

(F) other relevant information deemed appropriate.

(3) The regulatory treatments which the commission may implement include but are not limited to:

(A) approval of a range of rates for a specific service;

(B) approval of customer-specific contracts for a specific service; provided, however, that the commission shall approve a contract to provide central office based PBX-type services for

systems of 200 stations or more, billing and collection services, high-speed private line services of 1.544 megabits or greater, and customized services, provided that the contract is filed at least 30 days before initiation of the service contracted for; that the contract is accompanied with an affidavit from the person or entity contracting for t)ie telecommunications service stating that he considered the acquisition of the same, equivalent, or substitutable services by bid or quotation from a source other than the local exchange company; that the local exchange company is recovering the appropriate costs of providing the services; and that approval of the contract is in the public interest. The contract shall be approved or denied within 30 days after filing, unless the commission for good cause extends the effective date for an additional 35 days; and

(C) the detariffing of rates.

(f) Moreover, in order to encourage the rapid introduction of new or experimental services or promotional rates, the commission shall promulgate rules and establish procedures which allow the expedited introduction of, the establishment and adjustment of rates for, and withdrawal of such services, including requests for such services made to the commission by the governing body of a municipality served by a local exchange company having more than 500,000 access lines throughout the state. Rates established or adjusted at the request of a municipality may not result in higher rates for ratepayers outside the boundaries of the municipality and may not include any rates for local exchange company interexchange services or interexchange carrier access service.

(g) In promulgating new rules and establishing the procedures contemplated in Subsections (e) and (f) of this section, the commission shall seek to balance the public interest in a technologically advanced telecommunications system providing a wide range of new and innovative services with traditional regulatory concerns for preserving universal service, prohibiting anticompetitive practices, and preventing the subsidization of competitive services with revenues from regulated monopoly services. The commission shall promulgate these rules and establish these procedures so as

to incorporate an appropriate mix of regulatory and market mechanisms reflecting the level and nature of competition in the marketplace. Rates established under Subsections (e) and (f) of this section shall not be (1) unreasonably preferential, prejudicial, or discriminatory; (2) subsidized either directly or indirectly by regulated monopoly services; or (3) predatory or anticompetitive.

(h) The commission shall initiate a rulemaking proceeding and take public comment and promulgate rules which prescribe the standards necessary to ensure that all rates set under the provisions of this section cover their appropriate costs as determined by the commission. Until such rules are promulgated, the commission shall use a costing methodology that is in the public interest in determining whether the rates set under the provisions of this section cover their appropriate costs.

(i) The commission is granted all necessary power and authority to prescribe and collect fees and assessments from local exchange companies necessary to recover the commission's and the Office of Public Utility Counsel's costs of activities carried out and services provided under Subsections (e), (f), (g), (h), (i), (j), and (k) of this section.

(j) Subsections (e) and (f) of this section are not applicable to basic local exchange service, including local measured service. Paragraph (B) of Subdivision (3) of Subsection (e) of this section is not applicable to message telecommunications services, switched access services for interexchange carriers, or wide area telecommunications service. A local exchange company may not price similar services provided pursuant to contracts under Paragraph (B) of Subdivision (3) of Subsection (e) of this section in an unreasonably discriminatory manner. For purposes of this section, similar services shall be defined as those services which are provided at or near the same point in time, which have the same characteristics and which are provided under the same or similar circumstances.

(k) Before January 15 of each odd-numbered year, the commission shall report to the legislature on the scope of competition

in regulated telecommunications markets and the impact of competition on customers in both competitive and noncompetitive markets, with a specific focus on rural markets. The report shall include an assessment of the impact of competition on the rates and availability of telecommunications services for residential and business customers and shall specifically address any effects on universal service. The report shall provide a summary of commission actions over the preceding two years which reflect changes in the scope of competition in regulated telecommunications markets. The report shall also include recommendations to the legislature for further legislation which the commission finds appropriate to promote the public interest in the context of a partially competitive telecommunications market.

(l) Notwithstanding any other provision of this Act, the commission may enter such orders as may be necessary to protect the public interest, including the imposition on any specific service or services of its full regulatory authority under Articles III through XI of this Act, if the commission finds upon notice and hearing that an interexchange telecommunications carrier has engaged in conduct that demonstrates the ability to control prices in a manner adverse to the public interest.

(m) Notwithstanding any other provision of this Act, the commission may enter such orders as may be necessary to protect the public interest if the commission finds upon notice and hearing that an interexchange telecommunications carrier has:

(1) failed to maintain statewide average rates;

(2) abandoned interexchange message telecommunications service to a local exchange area in a manner contrary to the public interest; or

(3) engaged in a pattern of preferential or discriminatory activities prohibited by Sections 45 and 47 of this Act, except that nothing in this Act shall prohibit volume discounts or other discounts based on reasonable business purposes.

(n) In any proceeding before the commission alleging conduct or activities by an interexchange telecommunications carrier against another interexchange carrier in contravention of Subsections (l), (m), and (o) of this section, the burden of proof shall be upon the complaining interexchange telecommunications carrier; however, in such proceedings brought by customers or their representatives who are not themselves interexchange telecommunications carriers or in such proceedings initiated by the commission's general counsel, the burden of proof shall be upon the respondent interexchange telecommunications carrier. However, if the commission finds it to be in the public interest, the commission may impose the burden of proof in such proceedings on the complaining party.

(o) The commission shall have the authority to require that a service provided by an interexchange telecommunications carrier described in Subsection (e) of this section be made available in an exchange served by the carrier within a reasonable tune after receipt of a bona fide request for such service in that exchange, subject to the ability of the local exchange carrier to provide the required access or other service. No carrier shall be required to extend a service to an area if provision of that service would impose, after consideration of the public interest to be served, unreasonable costs upon or require unreasonable investments by the interexchange telecommunications carrier. The commission may require such information from interexchange carriers and local exchange carriers as may be necessary to enforce this provision.

(p) Before January 15 of each odd-numbered year, the commission shall report to the legislature on the scope of competition in regulated telecommunications markets and the impact of competition on customers in both competitive and noncompetitive markets, with a specific focus on rural markets. The report shall include an assessment of the impact of competition on the rates and availability of telecommunications services for residential and business customers and shall specifically address any effects on universal service. The report shall provide a summary of commission actions over the preceding two years that reflect changes in

the scope of competition in regulated telecommunications markets. The report shall also include recommendations to the legislature for further legislation that the commission finds appropriate to promote the public interest in the context of a partially competitive telecommunications market.

(q) The commission may exempt from any requirement of this section an interexchange telecommunications carrier that the commission determines does not have a significant effect on the public interest, and it may exempt any interexchange carrier which solely relies on the facilities of others to complete long distance calls if the commission deems this action to be in the public interest.

(r) Requirements imposed by Subsections (c), (d), (1), (m), (n), (o), (p), and (q) of this section on an interexchange telecommunications carrier shall apply to nondominant carriers and shall constitute the minimum requirements to be imposed by the commission for any dominant carrier.

Operator service; regulation and disclosure of Information

Sec. 18A. (a) In this section "operator service" means any service using live operator or automated operator functions for the handling of telephone service such as toll calling via collect, third number billing, and calling card services. Calls for which the called party has arranged to be billed (800 service) shall not be considered operator services. (b) Prior to the connection of each call the operator service provider shall:

(1) announce the provider's name; and

(2) quote, at the caller's request, the rate and any other fees or surcharges applicable to the call and charged by the provider.

(c) An operator service provider shall furnish each entity with which it contracts to provide operator service a sticker, card, or other form of information approved by the commission for each telephone that has access to the service and is intended to be utilized by the public, unless the owner of the telephone has received approval from the commission for an alternative form of information. The information must state the provider's name, that tile

operator service provider will provide rate information on the caller's request, that the caller will be informed how to access the local exchange carrier operator on request, and that any complaint about the service may be made to the provider or the commission at the designated telephone number. The operator service provider shall require by contract that the entity receiving the information display it on or near each of the telephones that has access to the service and is intended for use by the public.

(d) An operator service provider must, on request, inform the caller how to access the operator for the local exchange carrier serving the exchange from which the call is made. No charge shall be made for this information.

(e) The commission shall adopt rules requiring an operator service provider to include in its contract with each entity through which it provides operator service a requirement that the telephones subscribed to its services shall allow access to the local exchange carrier operator serving the exchange from which the call is made and to other telecommunications utilities; but in order to prevent fraudulent use of its services, an operator service provider and individual entities through which it provides operator services may block access if either obtains a waiver for this purpose from the commission or the Federal Communications Commission. The procedure and criteria for obtaining a waiver from the commission shall be set forth in the commission's rules.

(f) The commission shall promulgate rules consistent with the requirements of this section and any additional requirements deemed necessary to protect the public interest by January 1, 1990. All rules promulgated under this section shall be nondiscriminatory and designed to promote competition that facilitates consumer choice.

(g) The commission may investigate a complaint that it receives concerning operator services. If the commission determines that an operator service provider has violated or is about to violate this section, the commission may, upon proper notice and

evidentiary hearing, take action to stop, correct, or prevent the violation.

(h) This section applies only to a telecommunications utility that is not a dominant carrier. The commission is granted all necessary power and authority under this Act to promulgate rules and establish procedures for the purposes of enforcing and implementing this section.

Sec. 19. Repealed by Acts 1983, 68th Leg., p. 1222, eh. 263, § 25, eff. Sept. 1, 1983.

Municipally owned utilities

Sec. 20. Nothing in this article shall be construed to confer on the commission power or jurisdiction to regulate or supervise the rates or service of any utility owned and operated by any municipality within its boundaries either directly or through a municipally owned corporation, or to affect or limit the power, jurisdiction, or duties of the municipalities that have elected to regulate and supervise public utilities within their boundaries, except as provided in this Act.

ARTICLE IV. MUNICIPALITIES

Franchises

Sec. 21. Nothing in this Act shall be construed as in any way limiting the rights and powers of a municipality to grant or refuse franchises to use the streets and alleys within its limits and to make the statutory charges for the use thereof, but no provision of any franchise agreement shall limit or interfere with any power conferred on the commission by this Act. If a municipality performs regulatory functions under this Act, it may make such other charges as may be provided in the applicable franchise agreement, together with any other charges permitted by this Act.

Local utility service; exempt and nonexempt areas

Sec. 22. Notwithstanding any other provision of this section, municipalities shall continue to regulate each kind of local utility

service inside their boundaries until tile commission has assumed jurisdiction over the respective utility pursuant to this Act. If a municipality does not surrender its jurisdiction, local utility service within the boundaries of the municipality shall be exempt from regulation by the commission under the provisions of this Act to the extent that this Act applies to local service, and the municipality shall have, regarding service within its boundaries, the right to exercise the same regulatory powers under the same standards and rules as the commission, or other standards and rules not inconsistent therewith. Notwithstanding any such election, the commission may consider a public utility's revenues and return on investment in exempt areas in fixing rates and charges in nonexempt areas, and may also exercise the powers conferred necessary to give effect to orders under this Act, for the benefit of nonexempt areas. Likewise, in fixing rates and charges in the exempt area, the governing body may consider a public utility's revenues and return on investment in nonexempt areas. Utilities serving exempt areas shall be subject to the reporting requirements of this Act. Such reports shall be filed with the governing body of the municipality as well as with the commission. Nothing in this section shall limit the duty and power of the commission to regulate service and rates of municipally regulated utilities for service provided to other areas in Texas.

Rate determination

Sec. 23. Any municipality regulating its public utilities pursuant to this Act shall require from those utilities all necessary data to make a reasonable determination of rate base, expenses, investment, and rate of return within the municipal boundaries. The standards for such determination shall be based on the procedures and requirements of this Act and said municipality shall retain any and all personnel necessary to make the determination of reasonable rates required under this Act.

Ratemaking proceedings; engagement of consultants, accountants, auditors, attorneys and engineers; standing

Sec. 24. (a) The governing body of any municipality participating in or conducting ratemaking proceedings shall have the right to select and engage rate consultants, accountants, auditors, attorneys, engineers, or any combination thereof, to conduct investigations, present evidence, advise and represent the governing body, and assist with litigation in public utility ratemaking proceedings before the governing body, ally regulatory authority, or in court. The public utility engaged in such proceedings shall be required to reimburse the governing body for the reasonable costs of such services to the extent found reasonable by the applicable regulatory authority.

(b) Municipalities shall have standing in all cases before the commission regarding utilities serving within their corporate limits subject to the right of the commission to determine standing in cases involving retail service area disputes involving two or more utilities and to consolidate municipalities on issues of common interest and shall be entitled to judicial review of orders regarding said proceedings in accordance with Section 69 of the Act.

Assistance of commission

Sec. 25. The commission may advise and assist municipalities upon request in connection with questions and proceedings arising under this Act. Such assistance may include aid to municipalities in connection with matters pending before the commission or the courts, or before the governing body of any municipality, including making members of the staff available as witnesses and otherwise providing evidence to them.

Appeal

Sec. 26. (a) Any party to a rate proceeding before the governing body of a municipality may appeal the decision of the governing body to the commission.

(b) Citizens of a municipality may appeal the decision of the governing body in any rate proceeding to the commission through

the filing of a petition for review signed by the lesser of 20,000 or 10 percent of the number of qualified voters of such municipality.

Text of subsec. (c) as amended by Acts 1989, 71st Leg., ch. 325, § 1

(c) Ratepayers of a municipally owned electric utility outside the municipal limits may appeal any action of the governing body affecting the rates of the municipally owned electric utility through filing with the commission petition for review signed by tile lesser of 10,000 or 5 percent of the ratepayers served by such utility outside the municipal limits. For purposes of this subsection each person receiving a separate bill shall be considered as a ratepayer. But no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. Such petition for review shall be considered properly signed if signed by any person, or spouse of any such person, in whose name residential utility service is carried. Not later than the 90th day after the date on which a petition for review that meets the requirements of this subsection is filed, the municipality shall file with the commission a rate application that complies in all material respects with the rules and forms prescribed by the commission. The commission may, for good cause shown, extend the time period for filing the rate application.

Text of subsec. (c) as amended by Acts 1989, 71st Leg., ch. 1167, § 1

(c)(1) Ratepayers of a municipally owned electric utility outside the municipal limits may appeal any action of the governing body affecting the rates of the municipally owned electric utility through filing with the commission a petition for review signed by the lesser of 10,000 or 5 percent of the ratepayers served by such utility outside the municipal limits. For purposes of this subsection each person receiving a separate bill shall be considered as a ratepayer. But no person shall be considered as being more than one ratepayer notwithstanding the number of bills received. Such petition for review shall be considered properly signed if signed by any person, or spouse of any such person, in whose name residential

utility service is carried. The municipality that owns the electric utility shall on request disclose to any person the number of ratepayers who reside outside the municipal limits. The municipality shall provide the information by telephone or in a written form, as preferred by the person making the request. The municipality may not charge a fee for providing the information. The municipality shall on request provide to any person a list of the names and addresses of the ratepayers who reside outside the municipal limits. The municipality may charge a reasonable fee to cover the cost of providing the list.

(2) Not later than the 14th day after the date on which the governing body makes a final decision, the municipality shall issue a written report stating the effect of the decision on each class of ratepayers. The appeal process shall be instituted by filing a petition for review with the commission and serving copies on all parties to the original rate proceeding. The petition must be filed not later than the 45th day after the date on which the municipality issues the written report prescribed by this subsection.

(d) Any municipally owned electric utility whose rates have been or are appealed under Subsection (c) of this section, and for which the commission has ordered or orders a decrease in annual nonfuel base revenues which exceeds the greater of $25,000,000 or 10 percent of the utility's nonfuel base revenues, as calculated on a total system basis (without regard to the municipal utility's corporate boundaries) and established in the rate ordinance or ordinances appealed from, and for which the commission has found or finds that the rates paid by the combined residential or any other major customer class (other than any class or classes where the city is itself the customer of the municipally owned utility) are removed from cost of service levels to the extent that, under the nonfuel base revenue requirement adopted by the commission (as computed on a total system basis without regard to the municipality's corporate boundaries), a change in nonfuel base rate revenues in excess of 507, from adjusted test year levels would be required to move that class to a relative rate of return of unity (1.00 or 100%,) under the cost of service methodology adopted by the commission in an

appeal under Subsection (e) of this section, shall thereafter be subject to the following:

(1) For a period of 10 years beginning on the later of the effective date of this subsection, or the effective date of the rate ordinance which was the subject of the commission's final order invoking the application of this subsection, the commission shall have appellate jurisdiction over the rates charged by the municipally owned utility, both inside and outside such municipality's corporate limit. in the same manner and subject to the same commission powers and authority as set forth in this Act for public utilities, but specifically limited as follows:

(A) The commission shall have the jurisdiction to review the cost allocation and rate design methodologies adopted by the City Council or other governing body of the municipally owned utility subject to this subsection.

(i) If the commission finds that such cost of service methodologies result in rates which are unjust, unreasonable, or unreasonably discriminatory or unduly preferential to any customer class, then the commission may order the implementation of ratesetting methodologies which the commission finds reasonable.

(ii) The commission shall ensure that no customer class, other than any class or classes where the city is itself the customer of the municipally owned utility, pays rates which result in a relative rate of return exceeding 115 percent under the cost-of-service methodology found reasonable by the commission, provided that no customer class experience a percentage base rate increase that is greater than 1½ times the system average base increase. In moving above-cost classes toward cost-of-service levels, those classes farthest above cost shall be moved sequentially toward cost, such that no above-cost class moves toward cost until no other class or classes are further removed from cost.

(iii) The municipality may, as a matter of intra-class rate design, design residential rates to accomplish reasonable energy conservation goals, notwithstanding any other provision of this Act.

(B) The commission's jurisdiction under this subsection may be invoked by any party to the local rate proceedings required by this subsection, in the same manner as appeals of the rates of public utilities under Subsection (a) of this section. Provided, however, that the commission's jurisdiction under this subsection shall not extend to the municipally owned utility's revenue requirements, whether base rate or fuel revenues, its invested capital, its return on invested capital, "its debt service coverage ratio, or the level of any transfer of revenues from the utility to the municipality's general fund."

(2) The City Council or other governing board of a municipally owned utility subject to this subsection shall establish procedures similar to those procedures employed by municipalities which have retained original jurisdiction under Section 17(a) of this Act to regulate public utilities operating within such municipalities' corporate boundaries. Such procedures shall include a public hearing process in which affected ratepayers are granted party status on request and are grouped for purposes of participation in accordance with their common or divergent interests, including but not limited to tile particular interests of all-electric and out-of-city residential ratepayers. Provided, however, that nothing in this Act or this subsection shall require the City Council or governing board of the municipally owned utility to which this subsection applies to employ or establish procedures that require the use of the Texas Rules of Evidence, the Texas Rules of Civil Procedure, or the presentation of sworn testimony or other forms of sworn evidence. The City Council or other governing board shall appoint a consumer advocate to represent the interests of residential and small commercial ratepayers in the municipality's local rate proceedings. The consumer advocate's reasonable costs of participation in said proceedings, including the reasonable costs of ratemaking consultants and expert witnesses, shall be funded by and recovered from such residential and small commercial ratepayers.

(3) The Public Utility Commission shall establish rules applicable to any party to an appeal under Subsection (e) of this section that provide for the public disclosure of financial and

in-kind contributions and expenditures related to preparation of and filing of a petition for appeal and in preparation of expert testimony or legal representation for an appeal. Any party or customer who is a member of a party who makes a financial contribution or in-kind contribution to assist in an appeal of another party or customer class under Subsection (e) of this section shall, upon a finding of tile commission to that effect, be required to pay the municipally owned utility a penalty equivalent in amount to two times the contribution. Nothing in this subsection shall be construed to limit the right of any party or customer to expend funds to represent its own interests following the filing of a petition with the Public Utility Commission under Subsection (e) of this section.

(e) Any municipally owned electric utility whose rates have been or are appealed under Subsection (e) of this section, and for which the commission has ordered or orders a decrease in annual nonfuel base revenues which exceeds the greater of $25,000,000 or 10 percent of the utility's nonfuel base revenues, as calculated on a total system basis (without regard to the municipal utility's corporate boundaries) aid established in the rate ordinance or ordinances appealed from, and for which the commission has found or finds that the rates paid by the combined residential or any other major customer class (other than any class or classes where the city is itself the customer of the municipally owned utility) are removed from cost of service levels to the extent that, under tile nonfuel base revenue requirement adopted by the commission (as computed on a total system basis without regard to the municipality's corporate boundaries), a change in nonfuel base rate revenues in excess of 507, from adjusted test year levels would be required to move that class to a relative rate of return of unity (1.00 or 100%) under the cost of service methodology adopted by the commission in an appeal under Subsection (e) of this section, shall thereafter be subject to the following:

(1) For a period of 10 years beginning on the later of the effective date of this subsection, or the effective date of the rate ordinance which was the subject of the commission's final order invoking the application of this subsection, the commission shall

have appellate jurisdiction over the rates charged by the municipally owned utility, outside the municipality's corporate limits, in the manner and to the extent provided in this subsection.

(2) Ratepayers of a municipally owned utility subject to this subsection who reside outside the municipality's corporate limits may appeal any action of the governing body affecting the rates charged by the municipally owned electric utility outside the corporate limits through filing with the commission- a petition for review in accordance with the same procedures, requirements, and standards applicable to appeals brought under Subsection (e) of this section, except as otherwise specifically provided in this subsection. The petition for review must plainly disclose that the cost of bringing and pursuing the appeal will be funded by a surcharge on the monthly electric bills of outside-city ratepayers in a manner prescribed by the commission.

(A) Upon commission approval of the sufficiency of a petition, the appellants shall submit for the approval of the Office of Public Utility Counsel a budget itemizing the scope and expected cost of consultant services to be purchased by the appellants in connection with the appeal.

(B) After a final order has been entered by the commission in the appeal, the consultant and legal costs approved by public counsel as reasonable shall be assessed by the municipality on a per capita basis among residential ratepayers who reside outside the municipality. Surcharges shall be assessed in a one-time charge not later than 120 days following entry of the commission's final order. Costs incurred by the appellants shall be reimbursed by the municipality within not later than 90 days following the date the commission enters its final order.

(C) The municipality shall not include the costs associated with its defense of an appeal under this subsection in the rates of outside-city ratepayers. Nor shall the municipality, if it appeals from an order entered by the commission under this subsection, include the costs associated with its appeal in the rates of ratepayers who reside outside t)ie city.

(D) Ratepayers who appeal under this subsection may not receive funding for rate case expenses except from residential ratepayers who reside outside the municipality's boundaries or from other municipalities inside whose corporate limits the municipally owned utility provides service. The commission shall adopt rules for the reporting of financial and in-kind contributions in support of appeals brought under this subsection. Upon a finding by the commission that an appellant has received contributions from any source other than outside-city ratepayers or such other municipalities, the appeal and orders of the commission entered therein shall be null and void.

(3) In appeals under this subsection, the commission shall have jurisdiction Ind authority to review and ensure that the revenue requirements of any municipally owned utility subject to this subsection are reasonable, but such jurisdiction and authority does not extend to regulation of the use and level of any transfer of the utility's revenues to the municipality's general fund. The commission shall also have jurisdiction and authority to review the cost allocation and rate design methodologies adopted by the governing body of the municipally owned utility. If the commission finds that such cost of service methodologies result in rates which are unjust, unreasonable, or unreasonably discriminatory or unduly preferential to any customer class, then the commission may order the implementation of ratesetting methodologies which the commission finds reasonable; provided, however, that the commission's jurisdiction under this subsection shall not encompass matters of intra-class residential rate design.

(4) An intervenor in an appeal brought under this subsection shall be limited to presenting testimony and evidence on cost allocation and rate design methodologies, except that intervenors may present evidence and testimony in support of the municipality on issues related to utility revenues.

(5) An appellant ratepayer residing outside the corporate limits of a municipally owned utility subject to this subsection shall, in appealing from a rate ordinance or other ratesetting action

of the municipality's governing board, elect to petition for review under either Subsection (e) of this section or this subsection.

(f) The appeal process shall be instituted within 30 days of the final decision by the governing body with the filing of a petition for review with the commission and copies served on all parties to the original rate proceeding.

(g) The commission shall hear such appeal de novo based on the test year presented to the municipality and by its final order shall fix such rates as the municipality should have fixed in the ordinance from which the appeal was taken. In the event that the commission fails to enter its final order: (1) for proceedings involving the rates of a municipally owned utility, within 185 days from the date on which the appeal is perfected or on which the utility files a rate application as prescribed I)y Subsection (e) of this section; or (2) for proceedings in which similar relief has also been concurrently sought from the commission under its original jurisdiction, within 120 days from the date such appeal is perfected or the date upon which final action must be taken in the similar proceedings so filed with the commission whichever shall last occur; or (3) in all other proceedings, within 185 days from the date such appeal is perfected, the schedule of rates proposed by the utility shall be deemed to have been approved by the commission and effective upon the expiration of said applicable period. Any rates, whether temporary or permanent, set by the commission shall be prospective and observed from and after the applicable order of the commission, except interim rate orders necessary to effect uniform system-wide rates.

ARTICLE V. RECORDS, REPORTS, INSPECTIONS, RATES AND SERVICES

Records of public utility; rates, methods and accounts

Sec. 27. (a) Every public utility shall keep and render to the regulatory authority in the manner and form prescribed by the commission uniform accounts of all business transacted. The commission may also prescribe forms of books, accounts, records,

and memoranda to be kept by such public utilities, including the books, accounts, records, and memoranda of the rendition of and capacity for service as well as the receipts and expenditures of moneys, and any other forms, records, and memoranda which in the judgment of the commission may be necessary to carry out any of the provisions of this Act. In the case of any public utility subject to regulations by a federal regulatory agency, compliance with the system of accounts prescribed for the particular class of utilities by such agency may be deemed a sufficient compliance with the system prescribed by the commission; provided, however, that the commission may prescribe forms of books, accounts, records, and memoranda covering information in addition to that required by the federal agency. The system of accounts and the forms of books, accounts, records, and memoranda prescribed by the commission for a public utility or class of utilities shall not conflict nor be inconsistent with the systems and forms established by a federal agency for that public utility or class of utilities.

(b) The commission shall fix proper and adequate rates and methods of depreciation, amortization, or depltion of the several classes of property of each public utility, and shall require every public utility to carry a proper and adequate depreciation account in accordance with such rates and methods and with such other rules and regulations as the commission prescribes. Such rates, methods, and accounts shall be utilized uniformly and consistently throughout the ratesetting and appeal proceedings.

(c) Every public utility shall keep separate accounts to show all profits or losses resulting from the sale or lease of appliances, fixtures, equipment, or other merchandise. No such profit or loss shall be taken into consideration by the regulatory authority in arriving at any rate to be charged for service by any such public utility, to the extent that such merchandise is not integral to the provision of utility service.

(d) Every public utility is required to keep and render its books, accounts, records, and memoranda accurately and faithfully in the manner and form prescribed by the commission, and to

comply with all directions of the regulatory authority relating to such books, accounts, records, and memoranda. The regulatory authority may require the examination and audit of all accounts.

(e) In determining the allocation of tax savings derived from application of such methods as liberalized depreciation and amortization and the investment tax credit, the regulatory authority shall equitably balance the interests of present and future customers and shall apportion such benefits between consumers and the public utilities accordingly. Where any portion of the investment tax credit has been retained by a public utility, that same amount shall be deducted from the original cost of the facilities or other addition to the rate base to which the credit applied, to the extent allowed by the Internal Revenue Code.

(f) For the purposes of this section, "public utility" includes "municipally owned utility."

Powers of commission

Sec. 28. (a) The commission shall have the power to:

(1) require that public utilities report to it such information relating to themselves and affiliated interests both within and without the State of Texas as it may consider useful in the administration of this Act;

(2) establish forms for all reports;

(3) determine the time for reports and the frequency with which any reports are to be made;

(4) require that any reports be made under oath;

(5) require that a copy of any contract or arrangement between any public utility and any affiliated interest be filed with it. It may require any such contract or arrangement not in writing to be reduced to writing and filed with it;

(6) require that a copy of any report filed with any federal agency or any governmental agency or body of any other state be filed with it;

(7) require that a copy of annual reports showing all payments of compensation (other than salary or wages subject to the withholding of federal income tax) to residents of Texas, or with respect to legal, administrative, or legislative matters in Texas, or for representation before the Texas Legislature or any governmental agency or body; and

(8) the railroad commission shall have the power to review and approve, for purposes of the Outer Continental Shelf Lands Act Amendments of 19781 and any other federal authorities, applications by gas utilities for the purchase of natural gas from producing affiliates.

(b) On the request of the governing body of any municipality, the commission may provide sufficient staff members to advise and consult with such municipality on any pending matter.

Inspections; examination under oath; compelling production of records; inquiry into management and affairs

Sec. 29. (a) Any regulatory authority, and when authorized by the regulatory authority, its counsel, agents, and employees, shall have the right, at reasonable times and for reasonable purposes, to inspect and obtain copies of the papers, books, accounts, documents, and other business records, and to inspect the plant, equipment, and other property of any public utility within its jurisdiction. The regulatory authority may examine under oath, or it may authorize the person conducting such investigation to examine under oath, any officer, agent, or employee of any public utility in connection with such investigation. The regulatory authority may require, by order or subpoena served on any public utility, the production within this state at the time and place it may designate, of any books, accounts, papers, or records kept by that public utility outside the state, or verified copies in lieu thereof if the commission so orders. Any public utility failing or refusing to comply with any such order or subpoena is in violation of this Act.

(b)(1) A member, agent, or employee of the regulatory authority may enter the premises occupied by a public utility to

make inspections, examinations, and tests and to exercise any authority provided by this Act.

(2) A member, agent, or employee of the regulatory authority may act under this section only during reasonable hours and after giving reasonable notice to the utility.

(3) The public utility is entitled to be represented when inspections, examinations, and tests are made on its premises. Reasonable time for the utility to secure a representative shall be allowed before commencing an inspection, examination, or test.

(c) The regulatory authority may inquire into the management and affairs of all public utilities, and shall keep itself informed as to the manner and method in which the same are conducted.

Reporting of advertising or public relations expenses

Sec. 30. The regulatory authority may require an annual reporting from each utility company of all its expenditures for business gifts and entertainment, and institutional, consumption-inducing and other advertising or public relations expenses. The regulatory authority shall not allow as costs or expenses for rate-making purposes any of these expenditures which the regulatory authority determines not to be in the public interest. The cost of legislative-advocacy expenses shall not in any case be allowed as costs or expenses for rate-making purposes. Reasonable charitable or civic contributions may be allowed not to exceed the amount approved by the regulatory authority.

Unlawful rates, rules and regulations

Sec. 31. It shall be unlawful for any utility to charge, collect, or receive any rate for public utility service or to impose any rule or regulation other than as herein provided.

Filing schedule of rates, rules and regulations

Sec. 32. Every public utility shall file with each regulatory authority schedules showing all rates which are subject to the original or appellate jurisdiction of the regulatory authority and which are in force at the time for any public utility service, product,

or commodity offered by the utility. Every public utility shall file with, and as a part of such schedules, all rules and regulations relating to or affecting the rates, public utility service, product, or commodity furnished by such utility.

Office of public utility; records; removal from state

Sec. 33. Every public utility shall have an office in a county of this state in which its property or some part thereof is located in which it shall keep all books, accounts, records, and memoranda required by the commission to be kept in the state. No books, accounts, records, or memoranda required by the regulatory authority to be kept in the state shall be removed from the state, except on conditions prescribed by the commission.

Communications by public utilities with regulatory authority; regulations and records

Sec. 34. (a) The regulatory authority shall prescribe regulations governing communications by public utilities, their affiliates and their representatives, with the regulatory authority or any member or employee of the regulatory authority.

(b) Such records shall contain the name of the person contacting the regulatory authority or member or employee of the regulatory authority, the name of the business entities represented, a brief description of the subject matter of the communication, and the action, if any, requested by the public utility, affiliate, or representative. These records shall be available to the public on a monthly basis.

Standards of service

Sec. 35. (a) Every public utility shall furnish such service, instrumentalities, and facilities as shall be safe, adequate, efficient, and reasonable.

(b) The regulatory authority after reasonable notice and hearing had on its own motion or on complaint, may ascertain and fix just and reasonable standards, classifications, regulations, or practices to be observed and followed by any or all public utilities with

respect to the service to be furnished; ascertain and fix adequate and reasonable standards for the measurement of the quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the service; prescribe reasonable regulations for the examination and testing of the service and for the measurement thereof; and establish or approve reasonable rules, regulations, specifications, and standards to secure the accuracy of all meters, instruments and equipment used for the measurement of any service of any public utility. Any standards, classifications, regulations, or practices now or hereafter observed or followed by any public utility may be filed by it with the regulatory authority, and the same shall continue in force until amended by the public utility or until changed by the regulatory authority as herein provided.

(c) Notwithstanding any other provision of law, all lines owned by a public utility for the transmission and/or distribution of electric energy shall be constructed, operated, and maintained, as to clearances, in accordance with the National Electrical Safety Code Standard ANSI (c)(2), as adopted by the American National Safety Institute Ind in effect at the time of construction.

Examination and test of equipment

Sec. 36. (a) The regulatory authority may examine and test any meter, instrument, or equipment used for the measurement of any service of any public utility and may enter any premises occupied by any public utility for the purpose of making such examinations and tests and exercising any power provided for in this Act and may set up and use on such premises any apparatus and appliances necessary therefor. The public utility shall have the right to be represented at the making of the examinations, tests, and inspections. The public utility and its officers and employees shall facilitate the examinations, tests, and inspections by giving every reasonable aid to the regulatory authority and any person or persons designated by the regulatory authority for the duties aforesaid.

(b) Any consumer or user may have any meter or measuring device tested by the utility once without charge, after a reasonable period to be fixed by the regulatory authority by rule, and at shorter

intervals on payment of reasonable fees fixed by the regulatory authority. The regulatory authority shall declare and establish reasonable fees to be paid for other examining and testing such meters and other measuring devices on the request of the consumer. If the test is requested to be made within the period of presumed accuracy as fixed by the regulatory authority since the last such test of the same meter or other measuring device, the fee to be paid by the consumer or user at the time of his request shall be refunded to the consumer or user if the meter or measuring device is found unreasonably defective or incorrect to the substantial disadvantage of the consumer or user. If the consumer's request is made at a time beyond the period of presumed accuracy fixed by the regulatory authority since the last such test of the same meter or measuring device, the utility shall make the test without charge to the consumer or user.

ARTICLE VI. PROCEEDINGS BEFORE THE REGULATORY AUTHORITY

Power to insure compliance; rate regulation

Sec. 37. Subject to the provisions of this Act, the commission is hereby vested with all authority and power of the State of Texas to insure compliance with the obligations of public utilities in this Act. For this purpose the regulatory authority is empowered to fix and regulate rates of public utilities, including rules and regulations for determining the classification of customers and services and for determining the applicability of rates. No rule or order of the regulatory authority shall be iii conflict with the rulings of any federal regulatory body.

Just and reasonable rates

Sec. 38. It shall be the duty of the regulatory authority to insure that every rate made, demanded, or received by any public utility, or by any two or more public utilities jointly, shall be just and reasonable. Rates shall not be unreasonably preferential, prejudicial, or discriminatory, but shall be sufficient, equitable, and consistent in application to each class of consumers. For ratemaking purposes, the commission may treat two or more municipalities

served by a public utility as a single class wherever it deems such treatment to be appropriate. Approval by the commission of a reduced rate for service for a class of consumers eligible under Section 95 of this Act for tel-assistance service does not constitute a violation of this section.

Fixing overall revenues

Sec. 39. (a) In fixing the rates of a public utility the regulatory authority shall fix its overall revenues at a level which will permit such utility a reasonable opportunity to earn a reasonable return on its invested capital used and useful in rendering service to the public over and above its reasonable and necessary operating expenses.

(b) In fixing a reasonable return on invested capital, the regulatory authority shall consider, in addition to other applicable factors, efforts to comply with the statewide energy plan, the efforts and achievements of such utility in the conservation of resources, the quality of the utility's services, the efficiency of the utility's operations, and the quality of the utility's management.

Burden of proof

Sec. 40. Except as hereafter provided, in any proceeding involving any proposed change of rates, the burden of proof to show that the proposed change, if proposed by the utility, or that the existing rate, if it is proposed to reduce the rate, is just and reasonable shall be on the public utility. In any proceeding involving a local exchange company in which the local exchange company's rate or rates are in issue, the burden of proof that such rate or rates are just and reasonable shall be on the local exchange company.

Components of invested capital and net income

Sec. 41. The components of invested capital and net income shall be determined according to the following rules:

(a) Invested Capital. Utility rates shall be based upon the original cost of property used by and useful to the public utility in providing service including construction work in progress at cost

as recorded on the books of the utility. The inclusion of construction work in progress is an exceptional form of rate relief to be granted only upon the demonstration by the utility that such inclusion is necessary to the financial integrity of the utility. Construction work in progress shall not be included in the rate base for major projects under construction to the extent that such projects have been inefficiently or imprudently planned or managed. Original cost shall be the actual money cost, or the actual money value of any consideration paid other than money, of the property at the time it shall have been dedicated to public use, whether by the utility which is the present owner or by a predecessor, less depreciation.

(b) Separations and Allocations. Costs of facilities, revenues, expenses, taxes, and reserves shall be separated or allocated as prescribed by the regulatory authority.

(c) Net Income. By "net income" is meant the total revenues of the public utility less all reasonable and necessary expenses as determined by the regulatory authority. The regulatory authority shall determine expenses and revenues in a manner consistent with the following:

(1) Transactions with Affiliated Interests. Payment to affiliated interests for costs of any services, or any property, right or thing, or for interest expense shall not be allowed either as capital cost or as expense except to the extent that the regulatory authority shall find such payment to be reasonable and necessary for each item or class of items as determined by the commission. Any such finding shall include specific findings of the reasonableness and necessity of each item or class of items allowed and a finding that the price to the utility is no higher than prices charged by the supplying affiliate to its other affiliates or division for the same item or class of items, or to unaffiliated persons or corporations. The price paid by gas utilities to affiliated interests for natural gas from Outer Continental Shelf lands shall be subject to a rebuttable presumption that such price is reasonable if the price paid does not exceed the price permitted by federal regulation if such gas is

regulated by any federal agency or if not regulated by a federal agency does not exceed the price paid by nonaffiliated parties for natural gas from Outer Continental Shelf lands. The burden of establishing that such a price paid is not reasonable shall be on any party challenging the reasonableness of such price.

(2) Income Taxes. If the public utility is a member of an affiliated group that is eligible to file a consolidated income tax return, and if it is advantageous to tile public utility to do.so, income taxes shall be computed as though a consolidated return had been so filed and the utility had realized its fair share of the savings resulting from the consolidated return, unless it is shown to the satisfaction of the regulatory authority that it was reasonable to choose not to consolidate returns. The amounts of income taxes saved by a consolidated group of which a public utility is a member by reason of the elimination in the consolidated return of the intercompany profit on purchases by the public utility from an affiliate shall be applied to reduce the cost of the property or services so purchased. The investment tax credit allowed against federal income taxes, to the extent retained by the utility, shall be applied as a reduction in the rate based contribution of the assets to which such credit applies, to the extent and at such rate as allowed by the Internal Revenue Code.

(3) Expenses Disallowed. The regulatory, authority shall not consider for ratemaking purposes the following expenses:

(A) legislative advocacy expenses, whether made directly or indirectly, including but not limited to legislative advocacy expenses included in trade association dues;

(B) payments, except those made under an insurance or risk-sharing arrangement executed before the date of loss, made to cover costs of an accident, equipment failure, or negligence at a utility facility owned by a person or governmental body not selling power inside the State of Texas;

(C) Costs of processing a refund or credit under Subsection (e) of Section 43 of this Act; or

(D) any expenditure found by the regulatory authority to be unreasonable, unnecessary, or not in the public interest, including but not limited to executive salaries, advertising expenses, legal expenses, and civil penalties or fines.

The regulatory authority may promulgate reasonable rules and regulations with respect to the allowance or disallowance of any expenses for ratemaking purposes.

Cogenerator or small-power producer; agreement with electric utility for purchase of capacity; certification by commission

Sec. 41A. (a) In this section "qualifying facility" means a qualifying cogenerator or a qualifying small-power producer, as defined by Sections 3(18)(C) and 3(17)(D), respectively, Federal Power Act (16 U.S.C. Sections 796(18)(C) and 796(17)(D)).

(b) If an electric utility and a qualifying facility enter into an agreement providing for the purchase of capacity, the electric utility or qualifying facility may submit a copy of the agreement to the commission for certification under this section. The agreement may provide that it is contingent on that certification. Before the deadline specified by Subsection (d) of this section, the commission shall determine whether:

(1) the payments provided for in the agreement over the contract term are equal to or less than the utility's avoided costs as established by the commission and in effect at the time the agreement was signed. Contracts entered into before the effective date of this section may not be submitted for certification by the commission; and

(2) the agreement provides the electric utility the opportunity to acquire the cogeneration or small-power production installation before the installation is offered to another purchaser in the event of its abandonment, or provides other sufficient assurance that the electric utility will be provided with a comparable supply of electricity, if the qualifying facility ceases to operate the installation.

(c) If the commission determines that the agreement meets the requirements of Subdivisions (1) and (2) of Subsection (b) of this section, it shall certify that the agreement meets these requirements. If the commission does not make a determination under Subsection (b) of this section before the deadline specified by Subsection (d) of this section, the agreement is considered to meet the requirements of Subdivisions (1) and (2) of Subsection (b) of this section and certification is considered granted. A certification is effective until the earlier of 15 years after the date of the certification or the expiration date of the agreement.

(d) The commission shall make its determination under this section within 90 days after the date that the agreement is submitted, unless before this deadline the electric utility, the qualifying facility, or an affected person requests a hearing or the commission on its own motion decides to hold a hearing. If a hearing is requested or the commission decides to hold a hearing, the commission shall hold the hearing and make its determination within 120 days after the date that the agreement is submitted, except that this deadline is extended two days for each day in excess of five days on which the commission conducts a hearing on the merits of the case.

(e) In setting the electric utility's rates for a period during which the certification is effective, the regulatory authority shall consider payments made under the agreement to be reasonable and necessary operating expenses of the electric utility. The regulatory authority shall allow full, concurrent, and monthly recovery of the amount of the payments.

Self-insurance

Text of section as added by Acts 1989, 71st Leg., ch. 388, § I

Sec. 41B. (a) A public utility may self-insure all or a portion of its potential liability or catastrophic property loss, including windstorm, fire, and explosion losses which could not have been reasonably anticipated and included under operating and main-

tenance expenses. The commission shall approve a self-insurance plan under this section if it finds that the coverage is in the public interest and the plan is a lower cost alternative to purchasing commercial insurance, considering all costs, and that ratepayers will receive the benefits of that saving.

(b) In computing a utility's reasonable and necessary expenses under Subsection (c) of Section 41 of this Act, the regulatory authority shall allow as a necessary expense the funds credited to reserve accounts for the self-insurance, to the extent the regulatory authority finds it in the public interest. After the reserve account is established, the regulatory authority shall consider if the reserve account has a surplus or shortage in determining the utility's rate base. A surplus in the reserve account will exist if the charges against the reserve account are less than the funds credited to the reserve. A shortage in the reserve account will exist if the charges against the account are greater than the funds credited to the reserve. The regulatory authority shall subtract any surplus from and add any shortage to the rate base.

(c) The regulatory authority shall determine reasonableness under Subsection (b) of this section from information provided at the time the self-insurance plan and reserve account are established and upon the filing of each rate case by a utility that has such a fund.

(d) The commission shall adopt rules governing self-insurance under this section.

(e) The allowance for self-insurance under this Act for ratemaking purposes will not be applicable to nuclear plant investment.

Interference with terms or conditions of employment

Text of section as added by Acts 1989, 71st Leg., ch. 1182, § 1

Sec. 41B. The commission shall not have the authority to interfere with employee wages and benefits, working conditions, or other terms or condi-

tions of employment that are the product of a collective bargaining agreement recognized under federal law.

Employee wage rates and benefit levels that are the product of such bargaining shall be presumed reasonable.

Unreasonable or violative existing rates; investigating costs of obtaining service from another source

Sec. 42. Whenever the regulatory authority, after reasonable notice and hearing, on its own motion or on complaint by any affected person, finds that the existing rates of any public utility for any service are unreasonable or in any way in violation of any provision of law, the regulatory authority shall determine the just and reasonable rates, including maximum or minimum rates, to be thereafter observed and in force, and shall fix the same by order to be served on the public utility; and such rates shall constitute the legal rates of the public utility until changed as provided in this Act. Whenever a public utility does not itself produce or generate that which it distributes, transmits, or furnishes to the public for compensation, but obtains the same from another source, the regulatory authority shall have the power and authority to investigate the cost of such production or generation in any investigation of the reasonableness of the rates of such public utility.

Statement of intent to change rates; major changes; hearing; suspension of rate schedule; determination of rate level

Sec. 43. (a) No utility may make changes in its rates except by filing a statement of intent with the regulatory authority having original jurisdiction at least 35 days prior to the effective date of the proposed change. The statement of intent shall include proposed revisions of tariffs and schedules and a statement specifying in detail each proposed change, the effect the proposed change is expected to have on the revenues of the company, the classes and numbers of utility consumers affected, and such other information as may be required by the regulatory authority's rules and regulations. A copy of the statement of intent shall be mailed or delivered

to the appropriate officer of each affected municipality, and notice shall be given by publication in conspicuous form and place of a notice to the public of such proposed change once in each week for four successive weeks prior to the effective date of the proposed change in a newspaper having general circulation in each county containing territory affected by the proposed change, and by mail to such other affected persons as may be required by the regulatory authority's rules and regulations. The regulatory authority may waive the publication of notice requirement prescribed by this subsection in a proceeding that involves a rate reduction for all affected ratepayers only. The applicant shall give notice of the proposed rate change by mail to all affected utility customers. The regulatory authority by rule shall also define other proceedings for which the publication of notice requirement prescribed by this subsection may be waived on a showing of good cause, provided that no waiver may be granted in any proceeding involving a rate increase to any class or category of ratepayer.

(b) The regulatory authority, for good cause shown, may, except in the case of major changes, allow changes in rate to take effect prior to the end of such 35 day period under such conditions as it may prescribe, subject to suspension as provided herein. All such changes shall be indicated immediately upon its schedules by such utility. "Major changes" shall mean an increase in rates which would increase the aggregate revenues of the applicant more than the greater of $100,000 or two and one-half percent, but shall not include changes in rates allowed to go into effect by the regulatory authority or made by the utility pursuant to an order of the regulatory authority after hearings held upon notice to the public.

(c) Whenever there is filed with the Regulatory Authority any schedule modifying or resulting in a change in any rates than in force, the Regulatory Authority shall on complaint by any affected person or may on its own motion, at any time within 30 days from the date when such change would or has become effective, and, if it so orders, without answer or other formal pleading by the utility, but on reasonable notice, including notice to the governing bodies of all affected municipalities and counties, enter on a hearing to

determine the propriety of such change. The Regulatory Authority shall hold such a hearing in every case in which the change constitutes a major change in rates, provided that an informal proceeding may satisfy this requirement if no complaint has been received before the expiration of 45 days after notice of the change shall have been filed. In each case where the commission determines it is in the public interest to collect testimony at a regional hearing for the inclusion in the record, the commission shall hold a regional hearing at an appropriate location. A regional hearing [sic]iS DOt required ill a case involving a water, sewer, or member-owned utility, unless the commission determines otherwise.

(d) Pending the hearing and decision, the local Regulatory Authority, after delivery to the affected utility of a statement in writing of its reasons therefor, may suspend the operation of the schedule for a period not to exceed 90 days beyond the date on which the schedule of rates would otherwise go into effect and the commission may suspend the operation of the schedule for a period not to exceed 150 days beyond the date on which the schedule would otherwise go into effect. If the Regulatory Authority does not make a final determination concerning any schedule of rates prior to expiration of the period or periods of suspension, the schedule shall be deemed to have been approved by the Regulatory Authority. However, the 150-day period shall be extended two days for each one day of actual hearing on the merits of the case that exceeds 15 days. This approval is subject to the authority of the Regulatory Authority thereafter to continue a bearing in progress. The Regulatory Authority may in its discretion fix temporary rates for any period of suspension under this section. During the suspension by the Regulatory Authority as above provided, the rates in force when the suspended schedule was filed shall continue in force unless the Regulatory Authority shall establish a temporary rate. The Regulatory Authority shall give preference to the hearing and decision of questions arising under this section over all other questions pending before it and decide the same as speedily as possible.

(e) If the 150-day period has been extended, as provided for in Subsection (d) of Section 43 of this Act, and the commission fails to make its final determination of rates within 150 days from the date that the proposed change otherwise would have gone into effect, the utility concerned may put a changed rate, not to exceed the proposed rate, into effect upon the filing with the regulatory authority of a bond payable to the regulatory authority in an amount and with sureties approved by the regulatory authority conditioned upon refund and in a form approved by the regulatory authority. The utility concerned shall refund or credit against future bills all sums collected during the period of suspension in excess of the rate finally ordered plus interest at the current rate as finally determined by the regulatory authority.

(f) If, after hearing, the Regulatory Authority finds the rates to be unreasonable or in any way in violation of any provision of law, the Regulatory Authority shall determine the level of rates to be charged or applied by the utility for the service in question and shall fix the same by order to be served upon the utility; these rates are thereafter to be observed until changed, as provided by this Act.

(g)(1) A rate or tariff set by the commission shall not authorize a utility to automatically adjust and pass through to its customers changes in fuel or other costs of the utility.

(2)(A) Any revision of a utility's billings to its customers to allow for the recovery of additional fuel costs may be made only upon a public hearing and order of the commission.

(B) The commission may consider any evidence that is appropriate and in the public interest at such hearing.

(C) A proceeding under this subsection shall not be considered a rate case under Section 43 of this Act.

(3) The commission may, after a hearing, grant interim relief for fuel cost increases that are the result of unusual and emergency circumstances or conditions.

(4)(A) This subsection applies only to increases or decreases in the cost of purchased electricity which have been:

(i) accepted by a federal regulatory authority; or

(ii) approved after a hearing by the Public Utility Commission of Texas.

(B) The Public Utility Commission of Texas may utilize any appropriate method to provide for the adjustment of the cost of purchased electricity upon such terms and conditions as the commission may determine. Such purchased electricity costs may be recovered concurrently with the effective date of the changed costs to the purchasing utility or as soon thereafter as is reasonably practical.

(h) A water or sewer utility exempted in Subsection (a) of this section may change its rates by filing a statement of change with the commission at least 30 days after providing notice of the change to its customers. The changed rates may be put into effect on the filing of the statement of change. At the request of one-tenth of the customers of the utility within 60 days after the day the rates are put into effect, the commission may hold a hearing, which may be an informal proceeding. On a finding by the commission that the changed rates are not just and reasonable, the commission shall set the utility's rates according to its usual procedure. The utility shall refund or credit against future bills all sums collected since the filing of the statement of change in excess of the rate finally set plus interest at the current rate as finally determined by the commission. No filing for a rate change under this section may be made for a period of six months from the last such filing by the same utility.

(i) If the commission does not make a final determination concerning a local exchange company's schedule of rates prior to the expiration of the 150-day suspension period, the schedule of rates finally approved by the commission shall become effective and the local exchange company shall be entitled to collect such rates from the date tile 150-day suspension period expired. Any surcharges or other charges necessary to effectuate this subsection shall not be recovered over a period of less than 90 days from the date of the commission's final order.

(j) The commission on its own motion or on the petition of a utility shall provide for the adjustment of a utility's billing to reflect any increase or decrease of tax liability of the utility to the state resulting from House Bill 11, Acts of the 72nd Legislature, 1st Called Session, 1991, and that is attributable to activities that are subject to the jurisdiction of the commission. Any adjustment to billings under this section must be apportioned pro-rata to all types and classes of service provided by the utility and is effective only until the commission alters the adjustment as provided by this subsection or enters an order for the utility under this section or Section 42 of this Act. The adjustment of billings must be made effective at the same time as the increase or decrease of tax liability resulting from House Bill 11, Acts of the 72nd Legislature, 1st Called Session, 1991, or as soon after as is reasonably practical. Each year after any original adjustment, the commission shall review the utility's increase or decrease of tax liability resulting from House Bill 11, Acts of the 72nd Legislature, 1st Called Session, 1991, and alter the adjustment to reflect the increase or decrease. A proceeding under this subsection is not a rate case under this section.

Changes by local exchange companies; hearings; suspension of proposed changes

Sec. 43A. A local exchange company may make changes in its tariffed rules, regulations, or practices that do not affect its charges or rates by filing the proposed changes with the commission at least 35 days prior to the effective date of the changes. The commission may require such notice to ratepayers as it considers appropriate. The commission may on complaint by any affected person or on its own motion hold a hearing, after reasonable notice, to determine the propriety of the change. Pending the hearing and decision, the commission may suspend the operation of the proposed changes for a period not to exceed 120 days after the date on which the changes would otherwise go into effect. The commission shall approve, deny, or modify the proposed changes before expiration of the suspension period. In any proceeding

under this section, the burden of proving that the requested relief is in the public interest and complies with this Act shall be borne by the local exchange company.

Cooperative or small local exchange companies; statement of intent to change rates; notice of intent; suspension of rate schedule; review

Sec. 43B. (a) Except as otherwise provided by this section, a local exchange company that is a cooperative corporation or that has fewer than 5,000 access lines iii service iii this state may change rates by publishing notice of the change at least 60 days before the date of the change in the place and form as prescribed by the commission. The notice must include:

(1) the reasons for the rate change;

(2) a description of the affected service;

(3) an explanation of the right of the subscriber to petition the commission for a hearing. on the rate change; and

(4) a list of rates that are affected by the proposed rate change.

(b) At least 60 days before the date of the change, the local exchange company shall file with the commission a statement of intent to change rates containing:

(1) a copy of the notice required by Subsection (a) of this section;

(2) the number of access lines the company has in service in this state;

(3) the date of the most recent commission order setting rates of the company;

(4) the increase in total gross annual local revenues that will be produced by the proposed rates;

(5) the increase in total gross annual local revenues that will be produced by the proposed rates together with any local rate changes which went into effect during the 12 months preceding the

proposed effective date of the requested rate change and any other proposed local rate changes then pending before the commission;

(6) the increase in rates for each service category; Ind

(7) other information the commission by rule requires.

(c) The commission shall review a proposed change in the rates set by a local exchange company under this section upon the receipt of complaints signed by at least five percent of all affected subscribers or upon its own motion. The commission may require notice to ratepayers as it considers appropriate. If sufficient complaints are presented to the commission within 60 days after the date notice of the rate change was sent to subscribers, the commission shall review the proposed change. After notice to the local exchange company, the commission may suspend the rates during the pendency of the review and reinstate the rates previously in effect. Review under this subsection shall be as provided by Section 43 of this Act. The period for review by the commission does not begin until the local exchange company files a complete rate-filing package.

(d) If the commission has entered an order setting a rate, the affected local exchange company may not change that rate under this section before 365 days after the date of the commission's order setting the rate.

(e) This section does not prohibit a local exchange company from filing for a rate change under any other applicable section of this Act.

(f) The commission shall review a proposed change in the rates of a local exchange company under this section if the proposed rates, together with any local rate changes which went into effect during the 12 months preceding the proposed effective (late of the requested rate change as well as any other proposed local rate changes then pending before the commission, will increase its total gross annual local revenues by more than 2 ½ percent or if the proposed change would increase the rate of any service category by more than 25 percent, except for basic local service, which shall

be limited to a maximum of 2 ½ percent of the total gross annual local revenue. Review under this subsection shall be as provided by Section 43 of this Act. Each local exchange company may receive a change in its local rates or in any service category pursuant to this section only one time in any 12-month period.

(g) Rates established under this section must be in accordance with the rate-setting principles of Article VI of this Act.

(h) The commission is granted all necessary power and authority to prescribe and collect fees and assessments from local exchange companies necessary to recover the commission's and the Office of Public Utility Counsel's costs of activities carried out and services provided under Subsection (i) of Section 43 and Sections 43A and 43B of this Act.

Rates for areas not within municipality

Sec. 44. Public utility rates for areas not within any municipality shall not exceed without commission approval 115 percent of the average of all rates for similar services of all municipalities served by the same utility within the same county.

Unreasonable preference or prejudice as to rates or services

Sec. 45. No public utility may, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification, or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. No public utility may establish and maintain any unreasonable differences as to rates of service either as between localities or as between classes of service.

Equality of rates and services

Sec. 46. No public utility may, directly or indirectly, by any device whatsoever or in any manner, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered by the utility than that prescribed in the schedule of rates of the public utility applicable thereto when filed in the manner provided in this Act, nor may any person

knowingly receive or accept any service from a public utility for a compensation greater or less than that described in the schedules, provided that all rates being charged and collected by a public utility upon the effective date of this Act may be continued until schedules are filed. Nothing in this Act shall prevent a cooperative corporation from returning to its members the whole, or any part of, the net earnings resulting from its operations in proportion to their purchases from or through the corporation.

Discrimination; restriction on competition

Sec. 47. No public utility may discriminate against any person or corporation that sells or leases equipment or performs services in competition with the public utility, nor may any public utility engage in any other practice that tends to restrict or inhibit such competition.

Payments in lieu of taxes

Sec. 48. No payments made in lieu of taxes by a public utility to the municipality by which it is owned may be considered an expense of operation for the purpose of determining, fixing, or regulating the rates to be charged for the provision of utility service to a school district or hospital district. No rates received by a public utility from a school district or hospital district may be used to make or to cover the cost of making payments in lieu of taxes to the municipality by which the public utility is owned.

Telecommunications utility providing service to the state; delinquent payment charges

Sec. 48A. A telecommunications utility providing any service to the state, including service to an agency in any branch of state government, may not charge a fee, penalty, interest, or other charge for delinquent payment of a bill for that service.

ARTICLE VII. CERTIFICATES OF CONVENIENCE AND NECESSITY

Definitions

Sec. 49. For the purposes of this article only: (a) "Retail public utility" means any person, corporation, water supply or sewer service corporation, municipality, political subdivision or agency, or cooperative corporation, now or hereafter operating, maintaining, or controlling in Texas facilities for providing retail utility service.

(b) For the purposes of this article only, "public utility" includes a water supply or sewer service corporation.

Certificate required

Sec. 50. Beginning one year after the effective date of this Act, unless otherwise specified:

(1) No public utility may in any way render service directly or indirectly to the public under any franchise or permit without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require such installation, operation, or extension.

(2) Except as otherwise provided in this article no retail public utility may furnish, make available, render, or extend retail public utility service to any area to which retail utility service is being lawfully furnished by another retail public utility on or after the effective date of this Act, without first having obtained a certificate of public convenience and necessity that includes the area in which the consuming facility is located.

Exceptions for extension of service

Sec. 51. (a) A public utility is not required to secure a certificate of public convenience and necessity for:

(1) an extension into territory contiguous to that already served by it and not receiving similar service from another public

utility and not within the area of public convenience and necessity of another utility of the same kind;

(2) an extension within or to territory already served by it or to be served by it under a certificate of public convenience and necessity; or

(3) operation, extension, or service in progress on the effective date of this Act.

(b) Any extensions allowed by Subsection (a) of this section shall be limited to devices for interconnection of existing facilities or devices used solely for transmitting public utility services from existing facilities to customers of retail utility service.

Application; maps; evidence of consent

Sec. 52. (a) A public utility shall submit to the commission an application to obtain a certificate of public convenience and necessity or an amendment thereof.

(b) On or before 90 days after the effective date of this Act, or at a later date on request in writing by a public utility when good cause is shown, or at such later dates as the commission may order, each public utility shall file with the commission a map or maps showing all its facilities and illustrating separately facilities for generation, transmission, and distribution of its services.

(c) Each applicant for a certificate shall file with the commission such evidence as is required by the commission to show that the applicant has received the required consent, franchise, or permit of the proper municipality or other public authority.

Prior construction or operation

Sec. 53. On application made to the commission within six months after the effective date of this Act, the commission shall issue a certificate of public convenience and necessity for the construction or operation then being conducted to any public utility actually providing service to any geographical area on the effective date of this Act, or to any person or corporation actively engaged on the effective date of this Act in the construction, installation,

extension, or improvement of, or addition to, any facility or system used or to be used in providing public utility service.

Notice and hearing; issuance or refusal; factors considered; filing of notice of intent by electric utilities; time for approval or denial of new transmission facilities

Sec. 54. (a) When an application for a certificate of public convenience and necessity is filed, the commission shall give notice of such application to interested parties Ind, if requested, shall fix a time and place for a hearing and give notice of the hearing. Any person interested in the application may intervene at the hearing.

(b) Except for certificates for prior operations granted under Section 53, the commission may grant applications and issue certificates only if the commission finds that the certificate is necessary for the service, accommodation, convenience, or safety of the public. The commission may issue the certificate as prayed for, or refuse to issue it, or issue it for the construction of a portion only of the contemplated system or facility or extension thereof, or for the partial exercise only of the right or privilege.

(c) Certificates of convenience and necessity shall be granted on a nondiscriminatory basis after consideration by the commission of the adequacy of existing service, the need for additional service, the effect of the granting of a certificate on the recipient of the certificate and on any public utility of the same kind already serving the proximate area, and on such factors as community values, recreational and park areas, historical and aesthetic values, environmental integrity, and the probable improvement of service or lowering of cost to consumers in such area resulting from the granting of such certificate.

(d) In addition to the requirements of this section, an electric utility applying for certificate of convenience and necessity for a new generating plant must first file a notice of intent to file an application for certification.

(1) The notice of intent shall set out alternative methods considered to help meet the electrical needs, related electrical facilities, and the advantages and disadvantages of the alternatives. In addition, the notice shall indicate compatibility with the most recent long-term forecast provided in this Act.

(2) The commission shall conduct a hearing on the notice of intent to determine the appropriateness of the proposed generating plant as compared to the alternatives and shall issue a report on its findings. In conjunction with the issuance of the report, the commission shall render a decision approving or disapproving the notice. Such decision shall be rendered within 180 days from the date of filing the notice of intent.

(e) On approval of the notice of intent, a utility may apply for certification for a generating plant, site, and site facilities no later than 12 months before construction is to commence.

(1) The application for certification shall contain such information as the commission may require to justify the proposed generating plant, site, and site facilities and to allow a determination showing compatibility with the most recent forecast.

(2) Certificates of convenience and necessity shall be granted on a nondiscriminatory basis if the commission finds that the proposed new plant is required under the service area forecast, that it is the best and most economical choice of technology for that service area as compatible with the commission's forecast, and that conservation and alternative energy sources cannot meet the need.

(f) If the application for a certificate of convenience and necessity involves new transmission facilities, the commission shall approve or deny the application within one year after the date the application is filed. If the commission does not approve or deny the application before this deadline, any party may seek a writ of mandamus in a district court of Travis County to compel the commission to make a decision on the application.

Area included within city, town or village

Sec. 55. (a) If an area has been or shall be included within the boundaries of a city, town, or village as the result of annexation, incorporation, or otherwise, all public utilities certified or entitled to certification under this Act to provide service or operate facilities in such area prior to the inclusion shall have the right to continue and extend service in its area of public convenience and necessity within the annexed or incorporated area, pursuant to the rights granted by its certificate and this Act.

(b) Notwithstanding any other provision of law, a public utility shall have the right to continue and extend service within its area of public convenience and necessity and to utilize the roads, streets, highways, alleys, and public property for the purpose of furnishing such retail utility service, subject to the authority of the governing body of a municipality to require any public utility, at its own expense, to relocate its facilities to permit the widening or straightening 'of streets by giving to the public utility 30 days' notice and specifying the new location for the facilities along the right-of-way of the street or streets.

(e) This section may not be construed as limiting the power of cities, towns, and villages to incorporate or extend their boundaries by annexation, nor may this section be construed as prohibiting any city or town from levying taxes and other special charges for the use of the streets as are authorized by Section 182.025, Tax Code.

(d) Where a municipal corporation offers retail electric utility service in a city of more than 135,000 population located in a county of more than 1,500,000 population according to the last federal decennial census, the commission shall singly certificate areas within the corporate limits of such municipality where more than one electric utility provides electric utility service within such corporate limits. In singly certificating such areas, the commission shall preserve the respective electric utilities' rights to serve the customers such electric utilities are serving on the effective date of

this subsection. Provided, however, the foregoing shall not apply to customers served, at least partially, by a nominal 69,000 volts system, who have given notice of termination to the utility servicing that customer prior to the effective date of this subsection.

Contracts valid and enforceable

Sec. 56. Contracts between retail public utilities designating areas to be served and customers to be served by those utilities, when approved by the commission, shall be valid and enforceable and shall be incorporated into the appropriate areas of public convenience and necessity.

Preliminary order for certificate

Sec. 57. If a public utility desires to exercise a right or privilege under a franchise or permit which it contemplates securing but which has not as yet been granted to it, such public utility may apply to the commission for an order preliminary to the issuance of the certificate. The commission may thereupon make an order declaring that it will, on application, under such rules as it prescribes, issue the desired certificate on such terms and conditions as it designates, after the public utility has obtained the contemplated franchise or permit. On presentation to the commission of evidence satisfactory to it that the franchise or permit has been secured by the public utility, the commission shall issue the certificate.

Continuous and adequate service; discontinuance, reduction or impairment of service

Sec. 58. (a) Except as provided by this section or Section 58A of this Act, the holder of any certificate of public convenience and necessity shall serve every consumer within its certified area and shall render continuous and adequate service within the area or areas.

(b) Unless the commission issues a certificate that neither the present or future convenience and necessity will be adversely

affected, the holder of a certificate shall not discontinue, reduce, or impair service to a certified service area or part thereof except for:

(1) nonpayment of charges;

(2) nonuse; or

(3) other similar reasons in the usual course of business.

(c) Any discontinuance, reduction, or impairment of service, whether with or without approval of the commission, shall be in conformity with and subject to such conditions, restrictions, and limitations as the commission shall prescribe.

Conditions requiring refusal of service

Sec. 58A. The holder of a certificate of public convenience and necessity shall refuse to serve a customer within its certified area if the holder of the certificate is prohibited from providing the service under Section 212.012 or 232.0047, Local Government Code.

Sale, assignment or lease of certificate

Sec. 59. If the commission determines that a purchaser, assignee, or lessee is capable of rendering adequate service, a public utility may sell, assign, or lease a certificate of public convenience and necessity or any rights obtained under the certificate. The sale, assignment, or lease shall be on the conditions prescribed by the commission.

Interference with other public utility

Sec. 60. If a public utility in constructing or extending its lines, plant, or system interferes or attempts to interfere with the operation of a line, plant, or system of any other public utility, the commission may issue an order prohibiting the construction or extension or prescribing terms and conditions for locating the lines, plants, or systems affected.

Improvements in service; interconnecting service; extended area toll-free telephone service

Sec. 61. After notice and hearing, the commission may:

(1) order a public utility to provide specified improvements in its service in a defined area, if service in such area is inadequate or is substantially inferior to service in a comparable area and it is reasonable to require the company to provide such unproved service;

(2) order two or more public utilities to establish specified facilities for the interconnecting service; and

(3) order a telephone company or telephone companies to provide extended area toll-free service within a specified metropolitan area where there is a sufficient community of interest within the area and such service can reasonably be provided.

Revocation or amendment of certificate

Sec. 62. (a) The commission at any time after notice and hearing may revoke or amend any certificate of convenience and necessity if it finds that the certificate holder has never provided or is no longer providing service in the area, or part of the area, covered by the certificate.

(b) When the certificate of any public utility is revoked or amended, the commission may require one or more public utilities to provide service in the area in question.

ARTICLE VIII. SALE OF PROPERTY AND MERGERS

Report of sale, merger, etc.; investigation; disallowance of transaction

Sec. 63. No public utility may sell, acquire, lease, or rent any plant as an operating unit or system in this state for a total consideration in excess of $100,000 or merge or consolidate with another public utility operating in this state unless the public utility reports such transaction to the commission within a reasonable time. All transactions involving the sale of 50 percent or more of

the stock of a public utility shall also be reported to the commission within a reasonable time. On the filing of a report with the commission, the commission shall investigate the same with or without public hearing, to determine whether the action is consistent with the public interest. In reaching its determination, the commission shall take into consideration the reasonable value of the property, facilities, or securities to be acquired, disposed of, merged or consolidated. If the commission finds that such transactions are not in the public interest, the commission shall take the effect of the transaction into consideration in the rate-making proceedings and disallow the effect of such transaction if it will unreasonably affect rates or service. The provisions of this section shall not be construed as being applicable to the purchase of units of property for replacement or to the addition to the facilities of the public utility by construction.

Purchase of voting stock in another public utility: report

Sec. 64. No public utility may purchase voting stock in another public utility doing business in Texas, unless the utility reports such purchase to the commission.

Loans to stockholders: report

Sec. 65. No public utility may loan money, stocks, bonds, notes, or other evidences of indebtedness to any corporation or person owning or holding directly or indirectly any stock of the public utility unless the public utility reports the transaction to the commission within a reasonable time.

Sec. 66. Repealed by Acts 1983, 68th Leg., p. 1222, ch. 263, § 25, eff. Sept. 1, 1983.

ARTICLE IX. RELATIONS WITH AFFILIATED INTERESTS

Jurisdiction over affiliated interests

Sec. 67. The commission shall have jurisdiction over affiliated interests having transactions with public utilities under the jurisdiction of the commission to the extent of access to all accounts

and records of such affiliated interests relating to such transactions, including but in no way limited to accounts and records of joint or general expenses, any portion of which may be applicable to such transactions.

Disclosure of substantial interest in voting securities

Sec. 68. The commission may require the disclosure of the identity and respective interests of every owner of any substantial interest in the voting securities of any public utility or its affiliated interest. One percent or more is a substantial interest within the meaning of this section.

ARTICLE X. JUDICIAL REVIEW

Right to judicial review; evidence; commission as party defendant

Sec. 69. Any party to a proceeding before the commission is entitled to judicial review under the substantial evidence rule. The commission shall be a party defendant in any such proceeding represented by the attorney general.

Costs and attorney's fees

Sec. 70. Any party represented by counsel who alleges that existing rates are excessive or that those prescribed by the commission are excessive, and who is a prevailing party in proceedings for review of a commission order or decision, may in the same action recover against the regulation fund reasonable fees for attorneys and expert witnesser and other costs for its efforts before the commission and the court, the amount of such attorneys' fees to be fixed by the court. On a finding by the court that an action under this article was groundless and brought in bad faith and for the purpose of harassment the court may award to the defendant public utility the reasonable attorneys' fees

ARTICLE XI. VIOLATIONS AND ENFORCEMENT

Action to enjoin or require compliance

Sec. 71. Whenever it appears to the commission that any public utility or any other person or corporation is engaged in, or is about to engage in, any act in violation of this Act or of any order, rule, or regulation of the commission entered or adopted under the provisions of this Act, or that any public utility or any other person or corporation in failing to comply with the provisions of this Act or with any such rule, regulation, or order, the attorney general on request of the commission, in addition to any other remedies provided herein, shall bring an action in a court of competent jurisdiction in the name of and on behalf of the commission against such public utility or other person o? corporation to enjoin the commencement or continuation of any such act, or to require compliance with such Act, rule, regulation, or order.

Receivership

Sec. 71A. (a) At the request of the commission, the attorney general shall bring suit for the appointment of a receiver to collect the assets and carry on the business of a water or sewer utility that violates a final order of the commission or allows any property owned or controlled by it to be used in violation of a final order of the commission.

(b) The court shall appoint a receiver if such appointment is necessary to guarantee the collection of assessments, fees, penalties, or interest, to guarantee continued service to the customers of the utility, or to prevent continued or repeated violation of the final order.

(c) The receiver shall execute a bond to assure the proper performance of the receiver's duties in an amount:to be set by the court.

(d) After appointment and execution of bond the receiver shall take possession of the assets of the utility specified by the court. Until discharged by the court, tile receiver shall perform the duties

that the court directs to preserve the assets and carry on the business of the utility and shall strictly observe the final order involved.

(e) Upon a showing of good cause by the utility, the court may dissolve the receivership and order the assets and control of the business returned to tile utility.

Payment of costs of receivership

Sec. 71B. The receiver may, subject to the approval of the court and after giving notice to all interested parties, sell or otherwise dispose of real or personal property, or any part thereof, of a water or sewer utility against which a proceeding has been brought under this article for the purpose of paying for the costs incurred in the operation of the receivership. Said costs shall include but are not limited to the payment of fees to the receiver for his services; payment of fees to attorneys, accountants, engineers, or any other person or entity which provides goods or services necessary to the operation of tile receivership; payment of costs incurred in ensuring any property owned or controlled by a water or sewer utility is not used in violation of a final order of the commission.

Penalty against public utility or affiliated interest

Sec. 72. (a) Any public utility, water supply or sewer service corporation, or affiliated interest that knowingly violates a provision of this Act, fails to perform a duty imposed on it, or fails, neglects, or refuses to obey an order, rule, regulation, direction, or requirement of the commission or decree or judgment of a court, shall be subject to a civil penalty of not less than $1,000 nor more than $5,000 for each offense.

(b) A public utility, water supply or sewer service corporation, or affiliated interest commits a separate offense each day it continues to violate the provisions of Subsection (a) of this section.

(c) The attorney general shall institute suit on his own initiative or at the request of, in the name of, and on behalf of the commission, in a court of competent jurisdiction to recover the penalty under this section.

Penalty for violating section 6 of this Act

Sec. 73. (a) Any member of the commission, or any officer or director of a public utility or affiliated interest, shall be subject to a civil penalty of $1,000 for each and every knowing violation of Section 6 of this Act, such penalty to be recovered in a suit filed in a court of competent jurisdiction by the attorney general on his own initiative or at the request of, in the name of, and on behalf of, the commission.

(b) Any person, other than an officer or director of a public utility or affiliated interest or a member of the commission, shall be subject to a civil penalty of $500 for each and every knowing violation of Section 6 of this Act, such penalty to be recovered iii a suit filed in a court of competent jurisdiction by the attorney general on his own initiative or at the request of, in the name of, and on behalf of the commission.

(c) Any member, officer, or employee of the commission found in any action by a preponderance of the evidence to have violated any provision of Section 6 of this Act shall be removed from his office or employment.

Civil penalty for violations resulting in pollution

Sec. 73A. (a) If a public utility or any other person or corporation under the jurisdiction of the railroad commission pursuant to this Act violates this Act and the violation results in pollution of the air or water of this state or poses a threat to the public safety, the public utility or any other person may be assessed a civil penalty by the railroad commission.

(b) The penalty may not exceed $10,000 a day for each violation. Each day a violation continues may be considered a separate violation for purposes of penalty assessments.

(c) In determining the amount of the penalty, the railroad commission shall consider the public utility's, person's, or corporation's history of previous violations of this Act, the seriousness of the violation, any hazard to the health or safety of the public,

and the demonstrated good faith of the permittee or public utility, person, or corporation charged.

(d) A civil penalty may be assessed only after the public utility, person, or corporation charged with a violation described under Subsection (a) of this section has been given an opportunity for a public hearing.

(e) If a public hearing has been held, the railroad commission shall make findings of fact, and it shall issue a written decision as to the occurrence of the violation and the amount of the penalty that is warranted, incorporating, when appropriate, an order requiring that the penalty be paid.

(f) If appropriate, the railroad commission shall consolidate the hearings with other proceedings under this Act.

(g) If the public utility, Person, or corporation charged with the violation fails to avail itself of the opportunity for a public hearing, a civil penalty may be assessed by the railroad commission after it has determined that a violation did occur and the amount of the penalty that is warranted.

(h) The railroad commission shall then issue an order requiring that the penalty be paid.

(i) On the issuance of an order finding that a violation has occurred, the railroad commission shall inform the public utility, person, or coil)oration charged within 30 days of the amount of the penalty.

(j) Within the 30-day period immediately following the day on which the decision or order is final as provided in Section 16(c), Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), the public utility, person, or corporation charged with the penalty shall:

(1) pay the penalty in full; or

(2) if the public utility, person, or corporation seeks judicial review of either the amount of the penalty or the fact of the violation, or both:

(A) forward the amount to the railroad commission for placement in an escrow account; or

(B) in lieu of payment into escrow, post a supersedeas bond with the railroad commission under the following conditions. If the decision or order being appealed is the first final railroad commission decision or order assessing any administrative penalty against the public utility, person, or corporation, the railroad commission shall accept a supersede as bond. In the case of appeal of any subsequent decision or order assessing any administrative penalty against the public utility, person, or corporation, regardless of the finality of judicial review of any previous decision or order, the railroad commission may accept a supersedeas bond. Each supersedeas bond shall be for the amount of the penalty and in a form approved by the railroad commission and shall stay the collection of the penalty until all judicial review of the decision or order is final.

(k) If through judicial review of the decision or order it is determined that no violation occurred or that the amount of the penalty should be reduced or not assessed, the railroad commission shall, within the 30-day period immediately following that determination, if the penalty has been paid to the railroad commission, remit the appropriate amount to the public utility, person, or corporation with accrued interest, or where a supersedeas bond has been posted, the railroad commission shall execute a release of such bond.

(l) Failure to forward the money to the railroad commission within tile time provided by Subsection U) of this section results in a waiver of all legal rights to contest the violation or the amount of the penalty.

(m) Civil penalties owed under this section may be recovered in a civil action brought by the attorney general at the request of the railroad commission.

(n) Judicial review of the order or decision of the railroad commission assessing the penalty shall be under the substantial evidence rule and shall be instituted by filing a petition with the

district court of Travis County, Texas, and not elsewhere, as provided for in Section 19, Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

Personal penalty

Sec. 74. (a) Except as provided by Section 87B of this Act, any person or persons who willfully and knowingly violate the provisions of this Act shall be guilty of a third degree felony.

(b) All penalties accruing under this Act shall be cumulative and a suit for the recovery of any penalty shall not be a bar to or affect the recovery of any other penalty, or be a bar to any criminal prosecution against any public utility or any officer, director, agent, or employee thereof or any other corporation or person.

Contempt proceedings

Sec. 75. If any person fails to comply with any lawful order of the commission or with any subpoena or subpoena duces tecum or if any witness refuses to testify about any matter on which he may be lawfully interrogated, the commission may apply to any court of competent jurisdiction to compel obedience by proceedings for contempt.

Disposition of fines and penalties

Sec. 76. Fines and penalties collected under this Act in other than criminal proceedings shall be paid to the commission and paid by the commission to the state treasury to be placed in the general revenue fund.

Venue

Sec. 77. Suits for injunction or penalties under the provisions of this Act may be brought in Travis County, in any county where such violation is alleged to have occurred, or in the county or residence of any defendant.

ARTICLE XII. COMMISSION FINANCING

Assessments upon public utilities

Sec. 78. An assessment is hereby imposed upon each public utility within the commission's jurisdiction, including interexchange telecommunications carriers, serving the ultimate consumer equal to one-sixth of one percent of its gross receipts from rates charged the ultimate consumers in Texas for the purpose of defraying the costs and expenses incurred in the administration of this Act. Thereafter the commission shall, subject to the approval of the Legislature, adjust this assessment to provide a level of income sufficient to fund the commission and the office of public utility counsel. Any interexchange telecommunications carrier found dominant as to any service market under Section 100(b) or filing a petition under Section 100(f) of this Act shall be required to reimburse the Office of Public Utility Counsel for the costs of participation before the commission on behalf of residential ratepayers in any of the proceedings under Section 100 of this Act to the extent found reasonable by the commission. Recovery of costs under this section by the Office of Public Utility Counsel shall not exceed $175,000 per annum. Nothing in this Act or any other provision of law shall prohibit interexchange telecommunications carriers who do not provide local exchange telephone service from collecting the fee imposed under this Act as an additional item separately stated on the customer bill as "Utility Gross Receipts Assessment."

Payment dates; delinquency

Sec. 79. All assessments shall be due on August 15 of each year. Any public utility may instead make quarterly payments due on August 15, November 15, February 15, and May 15 of each year. There shall be assessed as a penalty an additional fee of 10 percent of the amount due for any late payment. Fees delinquent for more than 30 days shall draw interest at the rate of 12 percent per annum, compounded monthly, on the assessment and penalty due.

Collection and payment into general revenue fund

Sec. 80. All fees, penalties, and interest paid under the provisions of Sections 78 and 79 of this article shall be collected by the comptroller of public accounts and paid into the general revenue fund. The commission shall notify the comptroller of public accounts of any adjustment of the assessment imposed in Section 78 when made.

Approval of budget

Sec. 81. The budget of the commission shall be subject to legislative approval as part of the appropriations act.

Accounting records; audit

Sec. 82. The commission shall keep such accounting records as required by the comptroller. The financial transactions of the commission are subject to audit by tile state auditor in accordance with Chapter 321, Government Code.

ARTICLE XIII. MISCELLANEOUS PROVISIONS

Complaint by any affected person

Sec. 83. (a) Any affected person may complain to the regulatory authority in writing setting forth any act or thing done or omitted to be done by any public utility in violation or claimed violation of any law which the regulatory authority has jurisdiction to administer, or of any order, ordinance, rule, or regulation of the regulatory authority. The commission shall keep an information file about each complaint filed with the commission relating to a utility. The commission shall retain the file for a reasonable period.

(b) If a written complaint is filed with the commission relating to a utility, the commission, at least as frequently as quarterly and until final disposition of tile complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

(c) Any affected person may complain to the regulatory authority in writing setting forth any act or thing done or not done

by any recreational vehicle park owner that provides metered electric service under Article 1446d-2, Revised Statutes, in violation or claimed violation of any law that the regulatory authority has jurisdiction to administer or of any order, ordinance, rule, or regulation of the regulatory authority. The commission shall keep an information file about each complaint filed with the commission relating to a recreational vehicle park owner. The commission shall retain the file for a reasonable period. The commission, quarterly or more often until final disposition of the written complaint, shall notify the parties to the complaint of the status of the complaint unless the notice would jeopardize an undercover investigation.

Record of proceedings; right to hearing

Sec. 84. A record shall be kept of all proceedings had before the regulatory authority, and all the parties shall be entitled to be heard in person or by attorney.

Judicial stay or suspension of order, ruling or decision

Sec. 85. During the pendency of an appeal, the district court, the court of civil appeals, or the supreme court, as the case may be, may stay or suspend, in whole or in part, the operation of the regulatory authority order, ruling, or decision and such courts in granting or refusing a stay or suspension shall act in accordance with the practice of courts exercising equity jurisdiction. Sec. 86. [Blank]

Assumption of jurisdiction

Sec. 87. (a) The regulatory authority shall assume jurisdiction and all powers and duties of regulation under this Act on January 1, 1976, except as provided in Subsection (b) of this section.

(b) The regulatory authority shall assume jurisdiction over rates and service of public utilities on September 1, 1976.

Certain water and sewer utility property included in rate base; valuation used; depreciation expense

Sec. 87A. (a) The provisions of this section apply notwithstanding any other provision of this Act.

(b) Water and sewer utility property in service which was acquired from an affiliate or developer prior to September 1, 1976, included by the utility in its rate base shall be included in all ratemaking formulae and at the installed cost of the property rather than the price set between the entities. Unless the funds for this property are provided by explicit customer agreements, the property shall be considered invested capital and shall not be considered contributions in aid of construction or customer-contributed capital.

(c) Depreciation expense included in cost of service shall include depreciation on all currently used, depreciable utility property owned by the utility.

Dedicated line long distance service

Text of § 87B as added by Acts 1985, 69th Leg., ch. 407, § 2, and amended by Acts 1987, 70th Leg., ch. 1018, § 1.

Sec. 87B. A telecommunications utility providing dedicated line long distance service (TEXAN) to the state on August 31, 1987, shall continue to have this type of service available to the state on a month-to-month contract basis until September 1, 1988 . The contract will become effective on September 1, 1987, and shall be under terms and conditions negotiated by the state and the utility in accordance with the amounts appropriated by the General Appropriations Act for this purpose. The State Purchasing and General Services Commission shall perform all actions necessary to insure that one or more contracts for telecommunications services as provided in Article 10 of the State Purchasing and General Services Act (Article 601b, Vernon's Texas Civil Statutes) (TEXAN II) are awarded pursuant to the requirements of the State Purchasing and General Services Act (Article 601b, Vernon's Texas Civil Statutes) by October 15, 1987, and that TEXAN II is

operational no later than August 31, 1988. Those funds appropriated by the General Appropriations Act for extending the existing TEXAN contract which are not expended in fiscal year 1988 shall be transferred to the State Purchasing Ind General Services Commission for the sole purpose of offsetting the expenses associated with the administration of the TEXAN II network. If, during the period of nine this section is in effect, any:supplemental or other telecommunications service is required by the state, it may be acquired from vendors other than the utility or utilities providing TEXAN or TEXAN II service.

Automatic dial announcing device; use; penalty

Text of § 87B as added by Acts 1985, 69th Leg., ch. 450, § 1 Sec. 87B. (a) In this section, "automatic dial announcing device" means automatic equipment used for telephone solicitation or collection that:

(1) is capable of storing telephone numbers to be called, or has a random or sequential number generator capable of producing numbers to be called; and

(2) is capable, alone or in conjunction with other equipment, to convey a prerecorded or synthesized voice message to the number called.

(b) A person may not use an automatic dial announcing device unless:

(1) the person has obtained a permit from the commission and given written notice specifying the type of device to each telecommunications utility over whose system the device is to be used;

(2) the device is not used for random number dialing or to dial numbers determined by successively increasing or decreasing integers;

(3) the message conveyed by the device, or a message delivered by a human, states the nature of the call and the identity of the person, company or organization making the call;

(4) the device disconnects from the called person's line not later than 10 seconds after the called person hangs up; and

(5) for calls terminating in the State of Texas, the device is not used to make a call (a) on a Sunday before 1:30 p.m; or after 9 p.m., or before 9 a.m. or after 9 p.m. on a weekday or a Saturday, when the device is used for solicitation; or (b) at any hour that collection calls would be prohibited under the federal Fair Debt Collection Practices Act, 15 U.S.C. Section 801 et seq., when the device is used for collection purposes.

(c) A telecommunications utility may disconnect or refuse to connect service to a person using or intending to use an automatic dial announcing device if the utility determines that the device is not capable of disconnecting from a called party's line as required by this section or that the device would cause or is causing network harm. The telecommunications utility shall disconnect service to the person on a determination by the commission or a court that the person is violating this section, and may reconnect service to the person only on a determination by the commission that the person will comply with this section. The utility shall give notice to the person using the device of its intent to disconnect service not later than the third day before the date of the disconnection, except that if the device is causing network congestion or blockage, the notice may be given on the day before the date of disconnection.

(d) This section does not apply to the use of an automatic dial announcing device to call a person who has given to the person making the call written permission to be called by an automatic dial announcing device, except that a telecommunications utility may disconnect service to a person using the device if the device is causing network harm.

(e) An application for a permit under this section to use one or more automatic dial announcing devices must be accompanied by a fee in a reasonable amount calculated to cover the enforcement cost to the commission not to exceed $500, as determined by the commission. The proceeds of the fees shall be deposited in the general revenue fund.

(f) A person who operates an automatic dial announcing device in violation of this section commits an offense. An offense under this section is a Class C misdemeanor. Sec. 88. Repeated by Acts 1987, 70th Leg., ch. 654, § 7(b), eff. Sept. 1, 1987.

Commission as resource center, development of energy efficient school facilities

Sec. 88A. The commission may serve as a resource center to assist school districts in developing energy efficient facilities. As such, the commission may:

(1) present to school districts programs relating to managing energy, training school plant operators, and designing energy efficient buildings;

(2) provide school districts with technical assistance in managing energy;

(3) collect and distribute information relating to energy management in school facilities; and

(4) offer to educators energy resource workshops and may make available to educators a film library on energy-related matters and energy education lesson packages.

Liberal construction

Sec. 89. This Act shall be construed liberally to promote the effectiveness and efficiency of regulation of public utilities to the extent that such construction preserves the validity of this Act and its provisions. The provisions of this Act shall be construed to apply so as not to conflict with any authority of the United States.

Repealer; prior rules and regulations to remain in effect

Sec. 90. (a) Articles 1119, 1121, 1122, 1124, 1125, 1126, 1127, 1128, 1129, 1130, 1131, 1132, 1268, 1423, 1424, and 1425, Revised Civil Statutes of Texas, 1925, as amended; Section 8a, Chapter 283, Acts of the 40th Legislature, Regular Session, 1927 (Article 1011i, Vernon's Texas Civil Statutes) and all other laws

and parts of laws in conflict with this Act are repealed effective September 1, 1976.

(b) All rules and regulations promulgated by regulatory authorities in the exercise of their jurisdiction over public utilities, as defined in this Act, shall remain in effect until such time as the commission or railroad commission promulgates provisions applicable to the exercise of the commission's or railroad commission's jurisdiction over public utilities.

Terminating services to elderly and disabled; criteria and guidelines; establishment

Sec 91. The Public Utility Commission is authorized to establish criteria and guidelines with the utility industry relating to procedures employed by the industry in terminating services to the elderly and disabled.

Severability

Sec. 92. If any provision of this Act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Interexchange services; local exchange companies' rates

Sec. 93. Local exchange companies' rates for interexchange telecommunications services must be statewide average rates unless the commission on application and hearing orders otherwise. Nothing in this section limits a local exchange company's ability to enter into contracts for high speed private line services of 1.544 megabits or greater under the provisions of Section 18 of this Act.

Sec. 93A [Blank]

Hotels or motels; charges for telephone calls

Sec. 93B. The amount a hotel or motel charges for a local telephone call, a credit card telephone call, a collect telephone call,

or any other local telephone call for which assistance from the hotel or motel operator is not required may not exceed 50 cents.

ARTICLE XIV. TELECOMMUNICATIONS SERVICE ASSISTANCE PROGRAM; UNIVERSAL SERVICE FUND

Tel-assistance service

Sec. 94. The commission shall adopt and enforce rules requiring each local exchange company to establish a telecommunications service assistance program to be called "tel-assistance service." This service is established to provide eligible consumers with a reduction in costs of telecommunications services.

Eligibility for tel-assistance service; burden of proof; billing

Sec. 95. (a) To be eligible for tel-assistance service, an applicant must be a head of household, 65 years of age or older, and disabled as determined by the Texas Department of Human Services and must have a household income at or below the poverty level as determined by the United States Office of Management and Budget and reported annually in the Federal Register. The department, in accordance with this article and rules adopted by the department for the program, shall develop procedures for taking applications for certification of eligibility and for determining program eligibility. The burden of proving eligibility for tel-assistance service is on the consumer applying for the service.

(b) Each six months the department shall provide a list or lists of the names, addresses, and, if applicable, telephone numbers of all persons eligible for tel-assistance service to each local exchange company. The local exchange company shall determine from the list those consumers to whom the company provides service and within 60 days after receiving the list shall begin tel-assistance billing for eligible consumers. This billing shall continue until the local exchange company is notified by the department that a consumer is no longer eligible to receive tel-assistance service.

Tel-assistance services; billing; rates

Sec. 96. (a) The local exchange company shall provide tel-assistance service to all eligible consumers within its certificated area in the form of a reduction on each eligible consumer's telephone bill. The reduction shall apply only to the following types of service:

(1) residential flat rate basic local exchange service;

(2) residential local exchange access service; and

(3) residential local area calling usage, except that the reduction for local area calling usage shall be limited to an amount such that together with the reduction for local exchange access service the rate does not exceed the comparable reduced flat rate for the service.

(b) No other local voice service may be provided to the dwelling place of a tel-assistance consumer, nor may single or party line optional extended area service, optional extended area calling service, foreign zone, or foreign exchange service be provided to a tel-assistance consumer. Nothing in this section shall prohibit a person otherwise eligible to receive tel-assistance. service from obtaining and using telecommunications equipment designed to aid such person in utilizing telecommunications services.

(c) The reduction allowed by the telecommunications service assistance program shall be 65 percent of the applicable tariff rate for the service provided.

Statewide telecommunications relay access service for hearing-impaired and speech-impaired

Sec. 96A. (a) The commission shall adopt and enforced rules establishing a statewide telecommunications relay access service for the hearing-impaired and speech-impaired using specialized communications equipment such as telecommunications devices for the deaf (TDD) and operator translations. The purpose of this section is to provide for the uniform and coordinated provision of the service on a statewide basis by one telecommunications carrier.

(b) On or before January 1, 1990, the commission shall adopt rules establishing a statewide telecommunications relay access service for the hearing-impaired and speech impaired with the following provisions:

(1) the service shall provide the hearing-impaired and speech-impaired with access to the telecommunications network in Texas equal to that provided other customers;

(2) the service shall begin on or before September 1, 1990;

(3) the service shall consist of the following:

(A) switching and transmission of the call;

(B) verbal and print translations by either live or automated means between hearing-impaired and speech-impaired individuals who use TDD equipment or similar automated devices and others who do not have such equipment; and

(C) other service enhancements proposed by the carrier and approved by the commission;

(4) the calling or called party shall bear no charge for calls originating and terminating within the same local calling area;

(5) the calling or called party shall bear one-half of the total charges established by contract with the commission for intrastate interexchange calls;

(6) as specified in its contract with the commission, charges related to providing the service which are not borne by a calling or called party pursuant to Subdivisions (4) and (5) of this subsection shall be funded from the universal service fund;

(7) local exchange carriers shall not impose interexchange carrier access charges on calls which make use of this service and which originate and terminate in the same local calling area;

(8) local exchange carriers shall provide billing and collection services in support of this service at just and reasonable rates; and

(9) if the commission orders a local exchange company to provide for a trial telecommunications relay access service for the

hearing-impaired or speech-impaired, all pertinent costs and design information from this trial shall be available to the general public.

(c) The commission shall allow telecommunications utilities to recover their universal service fund assessment related to this service through a surcharge which the utility may add to its customers' bills. The commission shall specify how the amount of the surcharge is to be determined by each utility. If a utility chooses to impose the surcharge, the bill shall list the surcharge as the "universal service fund surcharge."

(d) For the purpose of funding the start-up costs of this service and for the first year of the service, the commission shall require that 55 percent of the funds shall come from local exchange carriers and that 45 percent of the funds shall come from all other telecommunications utilities. At the end of the first year of tile service, the commission shall set the appropriate assessments for the funding of the service by all telecommunications utilities. In setting the appropriate assessments after the first year for funding of the service, the commission shall consider the aggregate calling pattern of the users of the service and all other factors found appropriate and in the public interest by the commission. The commission shall review the assessments annually and adjust the assessments as found appropriate hereunder.

(e) On or before April 1, 1990, the commission shall select the telecommunications carrier which will provide the statewide telecommunications relay access service for "the hearing-impaired and speech-impaired. In awarding the contract for this service, the commission shall make a written award of the contract to the offerer whose proposal is the most advantageous to the state, considering price, the interests of the hearing-impaired and speech-impaired community in having access to a high quality and technologically advanced telecommunications system, and all other factors listed in the commission's request for proposals. The commission shall consider each proposal in a manner that does not disclose the contents of the proposal to competing offerers. The commission's evaluation of the proposals shall include:

(1) charges for the service;

(2) service enhancements proposed by the offerers;

(3) technological sophistication of the network proposed by the offerers; and

(4) the proposed commencement date for the service.

(f) The telecommunications carrier providing the service shall be compensated for providing such service at rates, terms, and conditions established in its contract with the commission. This compensation may include a return on the investment required to provide the service and compensation for unbillable and uncollectible calls placed through the service, provided that compensation for unbillable and uncollectible calls shall be subject to a reasonable limitation as determined by the commission.

(g) On or before September 15, 1989, the commission shall appoint an advisory committee to assist the commission in administering this section.

(1) The advisory committee shall be composed of:

(A) two deaf persons recommended by the Texas Association of the Deaf;

(B) one hearing-impaired person recommended by Self-Help for the Hard of Hearing;

(C) one hearing-impaired person recommended by the American Association of Retired Persons;

(D) one deaf and blind person recommended by the Texas Deaf/Blind Association;

(E) one speech-impaired person and one speech-impaired and hearing-impaired person recommended by the Coalition of Texans with Disabilities;

(F) two representatives of telecommunications utilities, one representing a nonlocal exchange utility and one representing a local exchange carrier, chosen from a list of candidates provided by the Texas Telephone Association;

(G) two persons, at least one of whom is deaf, with experience in providing relay services recommended by the Texas Commission for the Deaf; and

(H) two public members recommended by organizations representing consumers of telecommunications services.

(2) The commission shall appoint advisory committee members based on recommended lists of candidates submitted in accordance with Paragraph (F) of Subdivision (1) of this subsection.

(3) The advisory committee shall monitor the establishment, administration, and promotion of the statewide telecommunications relay access service and advise the commission in pursuing a service which meets the needs of the hearing-impaired and speech-impaired in communicating with other users of telecommunications services.

(4) The terms of office of each member of the advisory committee shall be two years. A member whose term has expired shall continue to serve until a qualified replacement is appointed.

(5) The members of the advisory committee shall serve without compensation but shall be entitled to reimbursement at rates established for state employees for travel and per them incurred in the performance of their official duties.

(6) The commission shall reimburse members of the advisory committee in accordance with Subdivision (5) of this subsection and shall provide clerical and staff support to the advisory committee, including a secretary to record the committee meetings.

(7) The commission's costs associated with the advisory committee shall be reimbursed from the universal service fund.

Recovery of lost revenues

Sec. 97. A local exchange company is entitled to recover the lost revenue, if any, resulting solely from the provision of tel-assistance service from the universal service fund, the establishment of which is provided for by this Act.

Universal service fund

Sec. 98. (a) The commission shall adopt and enforce rules requiring local exchange companies to establish a universal service fund to assist local exchange companies in providing basic local exchange service at reasonable rates in high cost rural areas, to reimburse local exchange companies for revenues lost as a result of providing tel-assistance service under this Act, to reimburse the telecommunications carrier providing the statewide telecommunications relay access service for the hearing-impaired and speech-impaired as authorized in Section 96A of this Act, and to reimburse the Texas Department of Human Services and the Public Utility Commission of Texas for costs incurred in implementing the provisions of this article.

(b) The universal service fund shall be funded by a statewide uniform charge, at rates and on services determined by the commission, payable by all telecommunications utilities that have access to the customer base. In establishing the uniform level of the charge and the services to which it will apply, the commission may not make or grant an unreasonable preference or advantage to a telecommunications utility or subject a telecommunications utility to unreasonable prejudice or disadvantage. The charge shall be paid in accordance with procedures approved by the commission.

(c) The commission shall:

(1) establish, in a manner that assures reasonable rates for basic local exchange service, eligibility criteria it finds necessary for participation in the universal service fund;

(2) determine which local exchange companies meet the eligibility criteria;

(3) determine the amount of and approve a procedure for reimbursement to local exchange companies of revenue lost in providing tel-assistance service under this Act;

(4) prescribe and collect fees from the universal service fund necessary to recover the costs the Texas Department of

Human Services and the Public Utility Commission incurred in implementing and administrating the provisions of this Article; and

(5) approve procedures for the collection and disbursal of the revenues of the universal service fund.

(d) The commission shall adopt rules for the implementation and administration of the universal service fund.

(e) The commission may do all things necessary and convenient to implement and administer the universal service fund.

Severability

Sec. 99. If this article conflicts with another provision of this Act, this article prevails.

Interexchange telecommunications carriers; determination of dominant carriers; separation of costs

Sec. 100. (a) The provisions of this section are applicable only to interexchange telecommunications carriers which do not provide local exchange service. A carrier dominant under this section for a service market is a dominant carrier for that service market under Section 3(c)(2) of this Act.

(b) The commission shall on or before November 1, 1987, initiate an evidentiary proceeding to determine whether any interexchange telecommunications carrier is dominant, as defined by Subsection 3(c)(2)(B) of this Act and in consideration of the relevant factors in Subsection (h) of this section, as to any service market as determined by the commission. The proceeding must result in a determination of dominance or nondominance in each service market no later than December 31, 1988. For the purposes of this section, the term "service market" shall mean the relevant market for each telecommunications service, and such markets shall be geographically statewide. The commission may group services which are closely related into one service market. Failure of the commission to make any determination required by this subsection by December 31, 1988, shall entitle any affected party to petition for a writ of mandamus or any other extraordinary relief

from any court of competent jurisdiction to compel the commission to make the required determination.

(c) In connection with the proceeding required in Subsection (b) of this section, the commission shall determine the status of interLATA interexchange competition, the effect of such competition on the public interest, and whether any interLATA interexchange carrier has sufficient market power as to any service market or markets to enable it to control prices in a manner adverse to the public interest. The commission shall report its findings and its recommendations for legislation, if any, to the legislature before January 15, 1989.

(d) If the commission finds that an interexchange telecommunications carrier is not a dominant carrier as to any service market, such carrier shall be subject as to such service only to those provisions of this Act applicable to nondominant carriers. An interexchange telecommunications carrier shall remain subject to the provisions of this Act applicable to dominant carriers in any service market in which that carrier remains or is found by the commission to be dominant. Any interexchange telecommunications carrier which is dominant as to any service provided in any service market shall be presumed dominant as to any new service which is the same as, equivalent to, or substitutable within the same service market for such dominant service. Any new service markets are subject to the approval and determination of dominance by the commission.

(e) The commission shall on or before November 1, 1987, initiate a rulemaking proceeding to determine a method and develop a framework for the separation of costs among any fully regulated services, regulated competitive services, and unregulated services for the purposes of Subsections (k) and (l) of this section. The purpose of this proceeding shall be to establish a methodology for separation of these costs in any subsequent proceedings relating to the rates for fully regulated services. This proceeding shall not be an inquiry into the specific costs or rates of any telecommunications carrier. The commission shall take evidence to assist in the

development of a methodology and shall allow for cross-examination of witnesses limited to the purposes of this subsection. Information required by the commission to carry out the requirements of this section may be obtained pursuant to the authority granted by Section 101 of this Act. The commission shall adopt rules pursuant to this subsection no later than November 1, 1988. Failure of the commission to make the required determinations on or before November 1, 1988, shall entitle any affected party to petition for a writ of mandamus or any other extraordinary relief from any court of competent jurisdiction to compel the commission to make the required determination.

(f) Any interexchange telecommunications carrier found dominant in any service market in the proceeding required by Subsection (b) of this section may petition the commission for a determination of whether the carrier is no longer a dominant carrier in any one or more service markets. Upon the request of any affected party or oil its own motion, the commission shall hold a hearing and shall make its determination under this subsection within 185 days of the filing of this petition. Unless otherwise authorized by the commission, no interexchange telecommunications carrier may file a petition under this paragraph until after January 15, 1990. The commission shall establish reasonable rules regarding the frequency of filing such petitions under this subsection.

(g) An interexchange telecommunications carrier seeking to be found nondominant in any service market pursuant to Subsections (b) and (f) of this section shall have the burden of proof to show such nondominance and shall provide all information required by the commission; provided that such carrier shall not have the burden to produce any information which is solely in the possession or control of another person or persons and which that person or persons refuse to provide; however, nothing in this subsection shall alter or reduce the overall burden of proof of such carrier as to dominance.

(h) In making any determination required by Subsections (b) and (f) of this section, the commission shall consider all factors it considers relevant to its determination, including but not limited to the following:

(1) the number and size of telecommunications utilities and other persons providing the same, equivalent, or substitutable service in the relevant market;

(2) the extent to which the same, equivalent, or substitutable service is available iii the relevant market,

(3) the ability of customers in the relevant market to obtain the same, equivalent, or substitutable services at comparable rates, terms, and conditions;

(4) the ability of telecommunications utilities or other persons to make the same, equivalent, or substitutable service readily available in the relevant market at comparable rates, terms, and conditions;

(5) the degree to which alternative interexchange facilities are available to resellers of interexchange telecommunications service;

(6) the market share of interexchange telecommunications utilities or other persons providing the same, equivalent, or substitutable service or services in the relevant market;

(7) the existence of any significant barrier to the entry or exit of a provider of the service in the relevant market,

(8) the extent to which one-plus equal access is available to interexchange telecommunications carriers and end users;

(9) the financial condition of telecommunications utilities or other persons providing the same, equivalent, or substitutable service in the relevant market insofar as shown by public information and documents.

(i) The legislature finds that the rules adopted by the commission and published in the Texas Register, Vol. 12, Number 25 (12 Tex.Reg. 1083), are within the authority granted by this Act and

are hereby validated. This section shall not be construed to expand the authority of the commission under Section 18(a) of this Act as adopted in 1983.

(j) For the purposes of this section, a regulated competitive service is defined as a service provided by an interexchange telecommunications carrier which is dominant in that service market for which the commission has determined that sufficient competition exists or for which the commission has determined that sufficient competition exists such that it is in the public interest to utilize a range of rates; a fully regulated service is defined as a service provided by an interexchange telecommunications carrier which is dominant in that service market and which is not a regulated competitive service.

(k) It is further the policy of this state to ensure that any fully regulated services of interexchange telecommunications utilities do not subsidize either directly or indirectly the unregulated services or regulated competitive services of such utilities. In that regard, fully regulated services shall not recover any of the direct, indirect, joint, or common costs, including any increased cost due to the risk of competition, not associated with fully regulated services. It is the purpose of this section to direct the commission and grant the commission the authority necessary to assure that any fully regulated services offered by interexchange telecommunications utilities do not subsidize unregulated services or regulated competitive services.

(l) The commission shall not allow any fully regulated services offered by interexchange telecommunications utilities to recover any of the direct, indirect, joint, or common costs, including any increased costs due to the risk of competition, not associated with the fully regulated services offered by such utilities.

Investigative and subpoena powers

Sec. 101. Notwithstanding any other provision of this Act, the commission is granted all investigative and subpoena powers necessary to obtain any information necessary to carry out the

requirements of Section 100 of this Act and in connection therewith may call and hold hearings and issue subpoenas to compel the attendance of witnesses and the production of papers and documents.

ARTICLE XV. AUTOMATIC DIAL ANNOUNCING DEVICES

Definitions

Sec. 111. In this article:

(1) "Automated dial announcing device" or "ADAD" means automated equipment used for telephone solicitation or collection that is capable:

(A) of storing telephone numbers to be called or has a random or sequential number generator capable of producing numbers to be called; and

(B) alone or in conjunction with other equipment, of conveying a prerecorded or synthesized voice message to the number called without the use of a live operator.

(2) "LEC" means a local exchange company, as that term is defined by Section 3 of this Act.

Exemptions

Sec. 112. This article does not apply to the use of an ADAD to make a telephone call:

(1) relating to an emergency or a public service under a program developed or approved by the emergency management coordinator of the county in which the call was received; or

(2) made by a public or private primary or secondary school system to locate or account for a truant student.

Requirements for operation of ADAD

Sec. 113. (a) A person may not operate an ADAD to make a telephone call if the device plays a recorded message when a connection is completed to a telephone number unless:

(1) the person has obtained a permit from the commission and given written notice specifying the type of device to each telecommunications utility over whose system the device is to be used;

(2) the device is not used for random number dialing or to dial numbers determined by successively increasing or decreasing integers;

(3) the message states during the first 30 seconds of the call the nature of the call, the identity of the person, company, or organization making the call, and the telephone number from which the call was made;

(4) the device disconnects from the called person's line not later than 30 seconds after the call is terminated by either party or, if the device cannot disconnect within that period, a live operator introduces the call and receives the oral consent of the called person before beginning a prerecorded or synthesized voice message; and

(5) for calls terminating in this state, the device is not used to make a call:

(A) before noon or after 9 p.m. on a Sunday or before 9 a.m. or after 9 p.m. on a weekday or a Saturday, if the device is used for solicitation; or

(B) at an hour at which collection calls would be prohibited under the federal Fair Debt Collection Practices Act (15 U.S.C. Section 1692 et seq.), if the device is used for collection purposes.

(b) In addition to the requirements prescribed by Subsection (a) of this section, if during the call a cross-promotion or reference to a pay-per-call information service is made, the call shall include:

(1) a statement that a charge will be incurred by a caller who makes a call to a pay-per-call information services telephone number;

(2) the amount of the flat-rate or cost-per-minute charge that will be incurred or the amount of both if both charges will be incurred; and

(3) the estimated amount of time required to receive the entire information offered by the service during a call.

(c) In this section, "pay-per-call information service" means a service that allows a caller to dial a specified "900" or "976" number to call a service that routinely delivers, for a predetermined and sometimes time-sensitive fee, a prerecorded or live message or interactive program.

Investigation of complaints; violations; disconnection of service

Sec. 114. (a) The commission shall investigate complaints relating to the use of an ADAD and enforce this article.

(b) If the commission or a court determines that a person has violated this article, the commission or court shall require a telecommunications utility to disconnect service to the person. The telecommunications utility may reconnect service to the person only on a determination by the commission that the person will comply with this article. The utility shall give notice to the person using the device of its intent to disconnect service not later than the third day before the date of the disconnection, except that if the device is causing network congestion or blockage, the notice may be given on the day before the date of disconnection.

(c) A telecommunications utility may, without an order by the commission or a court, disconnect or refuse to connect service to a person using or intending to use an ADAD if the utility determines that the device would cause or is causing network harm.

Application for permit to operate ADAD

Sec. 115. (a) An application for a permit to use one or more ADADs must be made using the form prescribed by the commission and must be accompanied by a fee in a reasonable amount computed to cover the enforcement cost to the commission, but not

to exceed $500, as determined by the commission. A permit is valid for one year after its effective date. Subject to Subsection (c) of this section, a permit may be renewed annually by making the filing required by this section and paying a filing fee of not more than $100, as determined by the commission. The proceeds of the fees shall be deposited to the credit for the General Revenue Fund.

(b) Each application for the issuance or renewal of a permit under this section must contain the telephone number of each ADAD that will be used and the physical address from which the ADAD will operate. If the telephone number of an ADAD or the physical address from which the ADAD operates changes, the owner or operator of the ADAD shall notify the commission by certified mail of each new number or address not later than the 48th hour before the hour at which the ADAD will begin operating with the new telephone number or at the new address. If the owner or operator of an ADAD fails to notify the commission as required by this subsection within the period prescribed by this subsection, the permit is automatically invalid.

(c) In determining if a permit should be issued or renewed, the commission shall consider the compliance record of the owner or operator of the ADAD. The commission may deny an application for the issuance or renewal of a permit because of the applicant's compliance record.

(d) The commission shall provide to an LEC on request a copy of a permit issued under this section and of any changes relating to the permit.

(e) An LEC that receives a complaint relating to the use of an ADAD shall send the complaint to the commission. The commission by rule shall prescribe the procedures and requirements for sending a complaint to the commission.

Violations; penalties

Sec. 116. (a) A person who owns or operates an ADAD and who operates the ADAD without a valid permit or with an expired permit or who operates the ADAD in violation of this article or a

commission rule or order is subject to an administrative penalty of not more than $1,000 for each day or portion of a day during which the ADAD was operating in violation of this section.

(b) The administrative penalty authorized by this section is civil in nature and is cumulative of any other penalty provided by law.

(c) The commission by rule shall prescribe the procedures for assessing an administrative penalty under this section. The procedures shall require proper notice and hearing in accordance with the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes).

(d) A person may appeal the final order of the commission under the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), using the substantial evidence rule on appeal.

(e) The proceeds of administrative penalties collected under this section shall be deposited to the credit of the General Revenue Fund.

Revocation of permit; offenses

Sec. 117. (a) The commission may revoke a permit issued under this article for failure to comply with this article.

(b) A person commits an offense if the person owns or operates an ADAD that the person knows is operating in violation of this article. An offense under this subsection is a Class A misdemeanor.

Rule-making authority

Sec. 118. The commission may adopt any rules necessary to carry out its powers and duties under this article.

Compliance with consumers' requests not to be called

Sec. 119. Every telephone solicitor operating in this state who makes consumer telephone calls subject to Section 37.02 of the Business & Commerce Code shall implement in-house systems and

procedures so that every effort is made not to call consumers who ask not to be called again. The commission is granted all necessary power and authority to enforce the provisions of this section.

Notice to consumer of provisions of Chapter 37 of the Business & Commerce Code and § 119

Sec. 120. The commission by rule shall require that a local exchange telephone company or telephone cooperative inform its customers of the provisions of Chapter 37 of the Business & Commerce Code and Section 119 of this Act by:

(1) inserting the notice annually in the billing statement mailed to a customer; or

(2) publishing the notice in the consumer information pages of its local telephone directory.

Sec. 3(c) amended by Acts 1981, 67th Leg., p. 70, ch. 31, § 1, eff. April 10, 1981; Acts 1981, 67th Leg., p. 312, ch. 123, § 1, eff. May 13, 1981; Acts 1981, 67th Leg., p. 2442, ch. 626, § 1, eff. Aug. 31, 1981; Sec. 16A added by Acts 1981, 67th Leg., p. 71, ch. 31, § 2, eff. April 10, 1981; Sec. 19(b) amended by Acts 1981, 67th Leg., p. 2443, ch. 626, § 2, eff. Aug. 31, 1981; Sec. 38 amended by Acts 1981, 67th Leg., p. 2749, ch. 751, § 1, eff. June 16, 1981; Sec. 43(a) amended by Acts 1981, 67th Leg., p. 2561, ch. 683, § 1, eff. Aug. 31, 1981; Sec. 43(g) added by Acts 1981, 67th Leg., p. 2562, ch. 683, § 2, eff. Aug. 31, 1981; Sec. 62(c) to (e) added by Acts 1981, 67th Leg., p. 2562, ch. 683, § 3, eff. Aug. 31, 1981; Sees. 71A, 71B added by Acts 1981, 67th Leg., p. 49, ch. 24, § 1, eff. April 7, 1981; Sec. 80 amended by Acts 1981, 67th Leg., p. 2563, ch. 683, § 4, eff. Aug. 31, 1981. Amended by Acts 1983, 68th Leg., p. 1259, ch. 274, § 1, eff. Sept. 1, 1983. Sec. 3(c) amended by Acts 1983, 68th Leg., p. 496, ch. 99, § 2, eff. Sept. 1, 1983; Acts 1983, 68th Leg., p. 1217, ch. 263, § 21, eff. Sept. 1, 198:3; Sec. 3(g), (i) amended by Acts 1983, 68th Leg., p. 1217, ch. 263, § 21, eff. Sept. 1, 1983; Secs. 20, 21, 25, 26 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 27(a), (b), (d) amended by Acts 1983, 68th Leg., p. 1220, ch. 263, § 22, eff. Sept. 1, 1983; Sec. 28

amended by Acts 1983, 68th Leg., p. 646, ch. 146, § 1, eff. Aug. 29, 1983; Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 29(a) amended by Acts 1983, 68th Leg., p. 1221, ch. 263, § 23, eft Sept. 1, 1983; Sees. 33, 37, 38 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 41 amended by Acts 1983, 68th Leg., p. 647, ch. 146, § 2, eff. Aug. 29, 1983; Sec. 44 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eff. Sept. 1, 1983; Sec. 49(b) amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 24, eff. Sept. 1, 1983; Sec. 55(d) added by Acts 1983, 68th Leg., p. 2624, ch. 448, § 1, eff. June 17, 1983; Secs. 63 to 65, 67, 68, 71, 72 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eft Sept 1, 1983; Sec. 73A added by Acts 1983, 68th Leg., p. 1413, ch. 286, § 4, eff. Sept. 1, 1983; Secs. 75, 76 amended by Acts 1983, 68th Leg., p. 1222, ch. 263, § 26, eft Sept. 1, 1983; Sec. 79 amended by Acts 1983, 68th Leg., p. 456, ch. 93, § 14, eff. Sept. 1, 1983; Act.,3 1983, 68th Leg., p. 1366, ch. 282, § 1, eff. June 9, 1983; Sec. 5a amended by Acts 1985, 69th Leg., ch. 479, § 87, eff. Sept. 1, 1985; Acts 1985, 69th Leg., ch. 729, § 33, eft Sept. 1, 1985; Sec. 6(a) amended by Acts 1985, 69th Leg., ch. 479, § 7, eff. Sept. 1, 1985; Sec. 74(a) amended by Acts 1985, 69th Leg., ch. 450, § 2, eff. Sept. 1, 1985; Sec. 87B added by Acts 1985, 69th Leg., ch. 407, § 2, eff. Sept. 1, 1985; Acts 1985, 69th Leg., ch. 450, § 1, eff. Sept. 1, 1985; Sec. 3(c) amended by Acts 1987, 70th Leg., el). 414, § 1, eff. Sept. 1, 1987; Sec. 3(v) added by Acts 1987, 70th Leg., ch. 371, § 1, eff. Sept. 1, 1987; Sec. 4 amended by Acts 1987, 70th Leg., ch. 150, § 1, eff. Aug. 31, 1987; See, 8(d) amended by Acts 1987, 70th Leg., ch. 150, § 2, eff. Aug. 31, 1987; Sec. 18(c), (d) amended by Acts 1987, 70th Leg., ch. 414, § 2, eff. Dee. 31, 1988; Sec. 18(e) to (k) added by Acts 1987, 70th Leg., ch. 371, § 3, eff. Sept. 1, 1987; Sec. 18(1) to (r) added by Acts 1987, 70th Leg, ch. 414, § 2, eff. Dec. 31, 1988; Sec. 38 amended by Acts 1987, 70th Leg., ch. 371, § 2, eff. Sept. 1, 1987; Sec. 40 amended by Acts 1987, 70th Leg., ch. 371, § 4, eff. Sept. 1, 1987; Sec. 41A added by Acts 1987, 70th Leg., ch. 308, § 1, eff. June 11, 1987; Sec. 43(i) added by Acts 1987, 70th Leg., ch. 371, § 5, eff. Sept. 1, 1987; Sees. 43A, 43B added by Acts 1987, 70th Leg., ch. 371, § 6, eff. Sept. 1,

1987; Sec. 48A added by Acts 1987, 70th Leg., ch. 1018, § 2, eff. Sept. 1, 1987; Sec. 54(f) added by Acts 1987, 70th L-eg., ch. 309, § 1, eff. June 11, 1987; Sec. 58(a) amended by Acts 1987, 70th Leg., ch. 1102, § 3, eff. Sept. 1, 1987; Sec. 58A added by Acts 1987, 70th Leg., ch. 1102, § 4, eff. Sept 1, 1987; Sec. 78 amended by Acts 1987, 70th Leg., ch. 414, § 3, eff. Dec. 31, 1988; Sec. 87B amended by Acts 1987, 70th Leg., ch. 1018, § 1, eff. Sept. 1, 1987; Sec. 88A added by Act.9 1987, 70th Leg., ch."147, § 5, eff. Sept. 1, 1987; Sec. 93 added by Acts 1987, 70th Leg., ch. 371, § 7, eff. Sept. 1, 1987; Sees. 94 to 99 added by Acts 1987, 70th Leg., ch. 371, § 8, eff. Sept. 1, 1987; Sees. 100, 101 added by Acts 1987, 70th Leg., ch. 414, § 4, eft Sept. 1, 1987; Sec. 3(c) amended by Acts 1989, 71st Leg., ch. 1154, § 1, eff. Sept. 1, 1989; Sec. 18(c) amended by Acts 1989, 71st Leg., ch. 1154, § 2, eff. Sept. 1, 1989; Sec. 18A added by Acts 1989, 71st Leg., ch. 1154, § 3, eff. Sept. 1, 1989; Sec. 26(c) amended by Acts 1989, 71st Leg., ch. 325, § 1, eff. Sept. 1, 1989; Sec. 26(c), (d) amended by Acts 1989, 71st Leg., ch. 1167, § 1, eff. Aug. 28, 1989; Sec. 26(c) amended by Acts 1989, 71st Leg., ch. 325, § 2, eff. Sept. 1, 1989; Sec. 26(e) amended by and (f), (g) added by Acts 1989, 71st Leg., ch. 1167, § 1, eff. Aug. 28, 1989; Sec. 35(c) added by Acts 1989, 71st Leg., ch. 735, § 1, eff. June 15, 1989; Sec. 41B added by Acts 1989, 71st Leg., ch. 388, § 1, eff. Sept. 1, 1989; Sec. 41B added by Acts 1989, 71st Leg., ch. 1182, § 1, eff. Aug. 28, 1989; Sec. 58A amended by Acts 1989, 71st Leg., ch. 1, § 46(c), eff. Aug. 28, 1989; Sec. 58A amended by Acts 1989, 71st Leg., ch. 624, § 312, eff. Sept. 1, 1989; Sec. 82 amended by Acts 1989, 71st Leg., ch. 584, § 46, eff. Sept. 1, 1989; Sec. 93B added by Acts 1989, 71st Leg., ch. 1154, § 4, eff. Sept. 1, 1989; Sec. 96A added by Acts 1989, 71st Leg., ch. 1154, § 5, eff. Sept. 1, 1989; Sec. 98(a) amended by Acts 1989, 71st Leg., ch. 1154, § 6, eff. Sept. 1, 1989. Sec. 3(c)(3) amended by Acts 1991, 72nd Leg., ch. 493, § 1, eff. Aug. 26, 1991; Sec. 5a amended by Acts 1991, 72nd Leg., 1st C.S., ch. 17, § 1.24, eff. Now. 12, 1991; Sec. 16(a) amended by Acts 1991, 72nd Leg., ch. 847, § 1, eff. June 16, 1991; Sec. 43(a) amended by Acts 1991, 72nd Leg., ch. 846, § 1, eff. June 16, 1991; Sec. 43(j) added by Acts 1991, 72nd Leg., 1st

C.S., ch. 5, § 16.072, eff. Sept. 1, 1991; Sec. 79 amended by Acts 1991, 72nd Leg., 1st C.S., ch. 5, § 13.05, eff. Sept. 1, 1991; Sec. 83(c) added by Acts 1991, 72nd Leg., ch. 493, § 2, eff. Aug. 26, 1991; Secs. 111 to 118 added by Acts 1991, 72nd Leg., ch. 496, § 1, eff. Sept. 1, 1991; Secs. 119, 120 added by Acts 1991, 72nd Leg., ch. 494, § 2, eff. Jan. 1, 1992.

Historical Note

The repealed § 88 authorized the commission to receive funds for and to administer various federal programs.

Section 16(b) of Acts 1983, 68th Leg., p. 457, ch. 93, provides:

"A provision of this Act that increases the interest rate on delinquent taxes applies to those taxes or assessments that are delinquent or become delinquent on or after the effective date of this Act."

Section 27 of Acts 1983, 68th Leg., p. 1229, ch. 263 provides:

"Rules and orders of the railroad commission adopted under the Public Utilities Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes) and in effect September 1, 1983, remain in effect until changed under the Gas.Utility Regulatory Act."

Section 2 of Acts 1983, 68th Leg., p. 1321, ch. 274 provides:

"This Act applies only to a proceeding in which the statement of intent or application is filed on or after the effective date of this Act. A proceeding in which the statement of intent or application is filed before the effective date of this Act is governed by the law in effect when the statement of intent or application was filed, and that law is continued in effect for that purpose."

Section 2(b) of Acts 1985, 69th Leg., ch. 407, provides:

"The expiration of Section 87B, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), as added by this Act, does not affect rights or liabilities regarding that law that accrue on or before the expiration date."

Section 10.003(a) to (e) of Acts 1985, 69th Leg-, ch. 795, provides:

"(a) The purpose of Article C, Part 3, of this Act is to transfer water and sewer utility regulation from the Public Utility Commission of Texas under the Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes) to the Texas Water Commission, and Chapter 13, Water Code, as added by this Act, is not intended to expand the jurisdiction, rights, powers, or duties of the Texas Water Commission in excess of those exercised by the Public Utility Commission of Texas before March 1, 1986. Further, Chapter 13, Water Code, is not intended to affect the jurisdiction and responsibilities for water rate regulation presently vested in tile Texas Water Commission under Title 2 of the Water Code. The transfer of water and sewer utility regulation from the Public Utility Commission of Texas to the Texas Water Commission does not impair or affect any act done or obligation, right, permit, license, standard or requirement, or penalty accrued or existing under the authority of the Public Utility Regulatory Act, and any prior action of the Public Utility Commission of Texas remains in force pertaining. to water and sewer utilities for the purpose of sustaining any proper action concerning such obligation, right, permit, license, standard or requirement, or penalty. No judicial action or proceeding instituted before March 1, 1986, is affected by the enactment of Chapter 13, Water Code.

"(b) On March 1, 1986, all equipment, data, documents, facilities, and other items of the Public Utility Commission of Texas pertaining to water and sewer utilities shall be transferred to the Texas Water Commission.

"(c) On March 1, 1986, the Texas Water Commission shall implement the powers and duties delegated to it by this Act. The commission, to the extent it considers advisable and under terms and conditions considered necessary and desirable, may contract with the Public Utility Commission of Texas to provide for the disposition of all water and sewer utility matters docketed and pending before the Public Utility Commission of Texas on March

1, 1986, and the Public Utility Commission of Texas shall cooperate with the Texas Water Commission in assisting in the orderly transition of regulatory power contemplated by this Act. The contract may provide that the staff of the Public Utility Commission of Texas shall continue to process, analyze, investigate, provide evidence, and conduct hearings on the pending water and sewer utility matters consistent with this Act. Any matter that requires a final decision, however, shall be reduced to a written proposal for decision conforming to the requirements of the Administrative Procedure and Texas Register Act (Article 6252-13a, Vernon's Texas Civil Statutes), which, together with the record, shall be submitted to the Texas Water Commission for final decision."

Provisions contained in § 88A of this article were formerly contained in art. 4413(47c), § 6A.

Section 1 of Acts 1987, 70th Leg., ch. 147, § 5 of which added § 88A of this article, enacted Title 4 of the Government Code.

Section 2 of Acts 1987, 70th Leg., ch. 309 provides:

"This Act applies only to an application for a certificate of convenience and necessity filed on or after the effective date of this Act A certificate of convenience and necessity filed before the effective date of this Act is governed by the law in effect when it was filed, and that law is continued in effect for that purpose."

Section 9 of Acts 1987, 70th Leg., ch. 371 provides:

"(a) The Texas Department of Human Services shall provide the first list required by Section 95, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), and the Public Utility Commission of Texas shall adopt the initial rules required by Subsections (e) and (f) of Section 18 of that Act before January 1, 1988, and by Subsection (h) of Section 18 and by Section 98 of that Act before July 1, 1988.

"(b) All fees and assessments collected under Subsection (i), Section 18, and Subsection (h), Section 43B, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), are

appropriated to the Public Utility Commission of Texas in an amount estimated to be $1,700,448 and to the Office of Public Utility Counsel in an amount not to exceed $509,802 to be used for the purposes specified in those sections for the biennium ending August 31, 1989. All fees collected under Subdivision (4), Subsection (c), Section 98, Public Utility Regulatory Act (Article 1446c, Vernon's Texas Civil Statutes), are appropriated to the Public Utility Commission of Texas in an amount not to exceed $300,000 and to the Texas Department of Human Services in an amount estimated to be $616,998 to be used for the purposes specified in that section for the biennium ending August 31, 1989."

Acts 1987, 70th Leg., ch. 654, § 9(b) to (d) provides:

"(b) All data, records, other personal property, and necessary personnel belonging or assigned to the energy efficiency division of the Public Utility Commission are transferred to the State Purchasing and General Services Commission on the effective date of this Act.

"(c) The central travel office of the travel division of the State Purchasing and General Services Commission shall extend its services to all state agencies not later than August 31, 1991.

"(d) The division of facilities planning and construction shall be designated the division of facilities construction and space management on the effective date of this Act."

Section 5 of Acts 1987, 70th Leg., 2nd C.S., ch. 52, art. 2 provides:

"Notwithstanding any requirement of Subsection (b), Section 9, S.B. No. 115, Acts of the 70th Legislature, Regular Session, 1987, Lo the contrary, all data, records, other personal property, and necessary personnel belonging or assigned to the energy efficiency division of the Public Utility Commission of Texas or the State Purchasing and General Services Commission, as appropriate, are transferred to the office of the governor on the effective date of this Act."

Sections 2 to 4 of Acts 1989, 71st Leg., ch. 1167, provide:

"Sec. 2. Any municipally owned utility which falls under the provisions of this Act on its effective date shall adjust its rates to comply with the provisions of this Act by January 1, 1990, and shall not, prior to that date, increase base rates for service provided to ally independent school district in complying with this Act. No appeals may be filed under Section 1 of this Act prior to January 1, 1990.

"Sec. 3. When contracting with any municipally owned utility which falls under the provisions of this Act, any conservation and reclamation district operating under Chapter 74, Acts of the 64th Legislature, Regular Session, 1975, [Water Aux. Laws Table 111] is not subject to the provisions of Section 4a(b) and Section 4b, Chapter 166, Acts of the 63rd Legislature, Regular Session, 1973 (Article 1435a, Vernon's Texas Civil Statutes), notwithstanding any other provisions to the contrary.

"Sec. 4. If any provision of this Act or application thereof to any person or circumstances is held invalid, then such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared severable."

Section 2 of Acts 1989, 71st Leg., ch. 1182, provides:

"This Act applies only to a proceeding before the regulatory authority initiated on or after the effective date of this Act."

Section 3 of Acts 1991, 72nd Leg., ch. 496, provides:

"(a) This Act takes effect September 1, 1991.

"(b) The change in law made by this Act applies only to an offense committed on or after the effective date of this Act. For puposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before that date.

"(c) An offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for this purpose."

Section 2 of Acts 1991, 72nd Leg., ch. 846 provides:

"This Act applies to a statement of intent filed on or after the effective date of this Act."

Section 2 of Acts 1991, 72nd leg., ch. 847 provides:

"This Act applies to a proceeding in which a final order has not been issued before the effective date of this Act."

Section 13.07 and 16.08(a) of Acts 1991, 72nd Leg., 1st C.S., ch. 5, provide:

"Sec. 13.07. (a) This article takes effect September 1, 1991. If this article may not take effect on that date under Article III, Section 39, of the Texas Constitution, this article takes effect December 1, 1991.

"(b) This article applies to taxes due on or after the effective date of this article. Taxes due before the effective of this article are governed by the law in effect when the taxes became due, and that law is continued in effect for the collection of taxes due and for civil and criminal enforcement of the liability for those taxes."

"Sec. 16.08. (a) Except as provided by Subsection (b) of this section, this article takes effect September 1, 1991. If this article may not take effect on that date under Article III, Section 39, of the Texas Constitution, this article takes effect December 1, 1991."

Cross References

Apartment houses, utility service rules and regulations, enforcement pursuant to this article, see art. 1446f, § 2(b).

Enterprise zone act, other local incentives, see Vernon's Ann.Civ.St. art. 5190.7, § 14.

Oil overcharge account, funding of Energy Resource Center for Texas Schools according to this act, see art. 4413(56), § 19.

Public utility counselor, employees, compensation from assessment under § 78 of this article, see art. 1446e, § 9.07(c).

Punishment,

Class C misdemeanor, see V.T.C.A. Penal Code, § 12.23.

Third-degree felony, see V.T.C.A. Penal Code, § 12.34.

State Cogeneration Council, see art. 4413(55).

Texas High-Speed Rail Act, conflict of laws, see art. 6674v.2, § 27.

Texas High-Speed Rail Authority, exemption from fees, see art. 6674v.2, § 15.

L1

PUBLIC UTILITY COMMISSION, TEXAS

Southwestern Bell Telephone Company

v.

MCI Telecommunications Corporation, CPI Microwave, Inc., Southern Pacific Communications Company, and Western Union Telegraph Company

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DOCKET NO. 568

February 3, 1978

DIRECT TESTIMONY OF SENATOR RONALD L. CLOWER

L2

THE STATE OF TEXAS §
§ AFFIDAVIT
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared SENATOR RONALD L. CLOWER, known to me to be the person whose name is subscribed to the following affidavit and who stated to me on his oath:

"My name is Ronald L. Clower, and I am a practicing attorney and a member of the Texas Senate with my offices in Dallas, Dallas County, Texas.

"Attached hereto and made a part hereof for all purposes is my direct testimony in Docket No. 568 before the Public Utility Commission of Texas, including attached exhibits.

"I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct, to the best of my knowledge and belief."

/s/ Ronald L. Clower

SUBSCRIBED AND SWORN TO BEFORE ME this the 2nd day of February, 1978, to certify which witness my hand and seal of office.

/s/ Rosalyn North
Notary Public in and for Dallas County, Texas

DIRECT TESTIMONY OF SENATOR RONALD L. CLOWER

1. Q Please state your full name.

   A Ronald L. Clower.

2. Q What is your occupation?

   A Attorney.

3. Q Are you a member of the Texas Legislature?

   A Yes.

4. Q When-were you initially elected?

   A 1972.

5. Q What Senatorial District do you represent?

   A District 9.

6. Q State your experience and knowledge with respect to utility legislation and regulation.

   A I was and am Chairman of the Senate Subcommittee on Consumer Affairs, which did interim studies between the 63rd and 64th Sessions (1973 and 1975) of the Legislature that in part led to enactment in the 64th Session of the Public Utility Regulatory Act. I have sponsored several bills relating to utilities during that period. I served on the State Affairs Committee during the 64th Session of the Legislature, which was the Senate Committee handling all the various public utility bills during that Session; and I served on the Conference Committee which issued the final Report on the bill that passed and resulted in the Public Utility Regulatory Act now in effect. As a result of my participation in the aforementioned activities and proceedings, I became aware of the organization, structure and operations of utilities operating in Texas, including telephone companies. I also have acquired knowledge of the structure and operations of utility regulatory

commissions in other states and, consequently, I am knowledgeable of the requirements which were and are necessary for the proper establishment and operations of such a commission in Texas.

7. Q Can you state when you or your committee first became involved in the concept of telephone regulation in Texas?

A Early in the 63rd Session, which was early in 1973.

8. Q Did you and other members of your committee reach any conclusions as to whether or not regulation of the telephone industry in Texas was necessary?

A Yes. Some of us felt regulation was necessary early on and, as events transpired, the vast majority of the members of the Legislature came to realize that some form of comprehensive regulation was called for.

9. Q What were those conclusions?

A For this proceeding, I will limit my answers to telephone utilities. First, telephone utilities are essentially, monopolistic and, as such, are guaranteed a profit-by the regulatory authority. Likewise, theoretically, the regulatory authority should regulate the utility's services to the public. We found a hodgepodge of attempted regulation in Texas.' Areas outside of cities were not subject to any regulation. Uninformed and lay city councils were not qualified to hear a rate case and, as such, the telephone companies had a field day on rates. Almost no service regulation was attempted.

Since there was no "market place" regulation of the vast majority of utility company services and rates, we felt that a comprehensive state-wide regulatory scheme was called for.

However, we also did not intend to transform or limit the competitive services offered by various manufac-

turers and transmission companies, who were engaging in competition with each other and with the telephone companies. In that connection, we were generally aware of previous decisions by the FCC and the courts which had created the beginnings of competition in certain segments of the communications industry.

In that early period, of course, our primary concern was with rates and services of the monopoly utilities, particularly-in the cities and towns in Texas. As the concept of regulation of the utilities progressed and these basic problems had been addressed, we turned our attention at a later time and, particularly in the 64th Session in 1975, to other concerns, including the need to preserve the growing competitive environment.

In short, we concluded that there was a "wasteland" of regulation in Texas, and that it would be essential to create a comprehensive regulatory act.

10. Q What action did you or other Senators in the Legislature take as a result of those conclusions?

A As I stated in my affidavit of September 27, 1977, filed with this Commission, a great deal of research was done on the whole subject of public utilities regulation prior to and during the 1975 session of the Legislature. Staff experts served the Subcommittee on Consumer Affairs of the Senate, of which I am Chairman, and the State Affairs Committee of the Senate, as well as the Transportation Committee and the State Affairs Committee of the House. In particular, Mr. Jack Hopper, a telephone industry,expert; Mr. Michael R. Thomasson, Chief of Staff of the Subcommittee on Consumer Affairs; Lawrence Veselka and Robert S. Bickerstaff, Legal Research and Administrative staff members assisting Lieutenant Governor William Hobby; and there were staff members on the committees of both the Senate and the House who were involved in this re-

search. Additionally, Representative John Wilson and his staff worked on the research on House Bill 819. An analysis of the regulatory legislation enacted in prior years in other states of the United States was conducted to determine the strengths and weaknesses of those pieces of legislation and how, in fact, the Utility Commissions established by those Acts had worked. Additionally, engineering and legal experts from the telephone, gas and power utility companies operating in Texas had discussions with me, other Senators and Representatives, and the various staff personnel serving the Committees in both Houses. The Texas Public Utility Regulatory Act was one of the most thoroughly researched, discussed, and debated pieces of legislation in many years in Texas, and all of us involved in the legislation received a large amount of data on regulatory principles and the operations, engineering, facilities and ratemaking factors involved in public utilities. Much of that information was obtained prior to the 1975 session and was supplemented by both staff experts and industry representatives throughout the session, which ended on June 2, 1975.

****

21. Q You mentioned the idea of competition in your previous answers. Can you tell me what role competition played in the Legislature's consideration of this Act?

A Yes, sir. I believe the Act makes that clear. In Section 2 of the Act, we point out that public utilities are, by definition, monopolies in the areas that they serve. As we state therefore the normal forces of competition which operate to regulate prices in a free enterprise society do not operate Therefore, it was the clear intent of the Legislature to regulate monopolies as we and I believe everyone in the utility industry understands that

term. It is perfectly clear, also, that there are specialized communications carriers functioning in a competitive environment and therefore we decided that they should not be regulated.

Further, Section 47 of the Act makes it very clear that we are not going to permit a regulated public utility, such as the telephone company, to discriminate against other persons or companies which sell or lease equipment or perform services in competition with those public utilities or let the public utilities engage in other conduct which might tend to restrict or impair competition. Section 47 is essentially the same as original Section 6.03 of Senate Bill No. 23 which I and Senators Doggett, Gammage and Swartz sponsored. There was never any debate against that section through the legislative proceedings.

It is perfectly clear that Section 47 is consistent "with the exemption of specialized carriers in Section 3 of the Act. I think it is pretty common knowledge that regulation is a poor substitute for competition in this country, and it was certainly our intention to preserve existing competition and protect that competition in the future when we adopted the Act.

M1

SOUTHWESTERN BELL CORPORATION

1989 FINANCIAL AND COMPANY DATA

1989 TOTAL OPERATING REVENUES	$8,729,800,000
1989 NET INCOME	$1,092,800,000
1989 TOTAL ASSETS	$21,160,500,000
EMPLOYEES	66,200
NETWORK ACCESS LINES IN SERVICE	11,759,000
MINUTES OF USE (1)	34,295,000,000
LONG DISTANCE MESSAGES (2)	987,940,000

(1) REPRESENTS THE UNITS BY WHICH LONG DISTANCE CARRIERS ARE CHARGED FOR USAGE OF TELCO'S NETWORK

(2) REPRESENTS THE NUMBER OF LONG DISTANCE CALLS HANDLED BY TELCO

SOURCE: 1989 ANNUAL REPORT

M2

DECEMBER 31, 1989 ASSETS

COMPARISON OF SELECTED

U.S. CORPORATIONS

NAME	ASSETS ($MILLIONS)
SOUTHWESTERN BELL	$21,161
WESTINGHOUSE ELECTRIC	20,314
TENNECO	17,381
PROCTER & GAMBLE	16,351
PEPSICO	15,127
MCDONNELL DOUGLAS	13,397
BOEING	13,278
PHILLIPS PETROLEUM	11,256
CATERPILLAR	10,926
HEWLETT-PACKARD	10,075
DEERE	9,146
ANHEUSER-BUSCH	9,026
SUN	8,699
MONSANTO	8,604
BRISTOL-MYERS SQUIBB	8,497
GOODYEAR TIRE & RUBBER	8,460
COCA-COLA	8,283
JOHNSON &JOHNSON	7,919
MOTOROLA	7,686
LOCKHEED	6,792
GENERAL DYNAMICS	6,549
LTV	6,336
REYNOLDS METALS	5,556
HONEYWELL	5,258
LITTON INDUSTRIES	5,257

KIMBERLY-CLARK	4,923
ABBOTT LABORATORIES	4,852
TEXAS INSTRUMENTS	4,804
BETHLEHEM STEEL	4,793
NCR	4,500
RALSTON PURINA	4,382
QUAKER OATS	3,222
GENERAL MILLS	2,888

SOURCE: FORTUNE, APR 23 AND JUNE 4, 1990

M4

1989 OPERATING REVENUES

COMPARISON OF SELECTED

U.S. CORPORATIONS

NAME	OPERATING REVENUES ($MILLIONS)
SOUTHWESTERN BELL	$8,730
MONSANTO	8,681
TIME WARNER	7,642
BORDEN	7,593
HONEYWELL	7,242
DEERE	7,221
RALSTON PURINA	6,712
TEXAS INSTRUMENTS	6,592
LTV	6,362
WHIRLPOOL	6,289
REYNOLDS METALS	6,201
NCR	5,956
GENERAL MILLS	5,798
KIMBERLY-CLARK	5,777
COMMONWEALTH EDISON	5,751
QUAKER OATS	5,724
ABBOTT LABORATORIES	5,454
BETHLEHEM STEEL	5,306
LITTON INDUSTRIES	5,130

SOURCE: FORTUNE, APR 23 AND JUNE 4, 1990

SOUTHWESTERN BELL CORPORATION

- SBC Administrative Services, Inc.
- SBC Corporate Services, Inc.
- SBC Graphics, Inc.
- SBC Technology Resources, Inc.
- Southwestern Bell Capital Corporation
- Southwestern Bell Corporation Washington, Inc.
- SBC Asset Management, Inc.
  - The Golf Club of Oklahoma, Inc.
- Gulf Printing Company*
  - Time Journal Publishing Company
- Southwestern Bell Mobile Systems, Inc.
  - Amarillo SMSA Limited Partnership (GP)
  - St. Louis Cellular System, Inc.
  - St. Joseph SMSA Limited Partnership (GP)
  - Kansas City Cellular System, Inc.
  - Topeka SMSA Limited Partnership (GP)
  - Kansas City SMSA Limited Partnership (GP)
  - Lubbock SMSA Limited Partnership (GP)
  - Dallas Cellular System, Inc.
  - Midland-Odessa SMSA Limited Partnership (GP)
  - Dallas SMSA Limited Partnership (GP)
  - Abilene SMSA Limited Partnership (GP)
  - Oklahoma City SMSA Limited Partnership (GP)
  - Corpus Christi SMSA Limited Partnership (GP)
  - San Antonio SMSA Limited Partnership (GP)
  - McAllen-Edinburg-Mission SMSA Limited Partnership (GP)
  - Wichita SMSA Limited Partnership (GP)
  - Laredo SMSA Limited Partnership (GP)
- Southwestern Bell Telephone Company (MO)
  - Southwestern Bell Telephone Company of Arkansas

Arkansas Bell Telephone Company
Southwestern Bell Telephone Company (OK)
Oklahoma Bell Telephone Company
Kansas Bell Telephone Company
Missouri Bell Telephone Company
Texas Bell Telephone Company
Texas Bell Communications Company
Southwestern Bell Redevelopment Corporation
Bell Communications Research, Inc.
Southwestern Bell Publications, Inc.
Metromedia Cellular Services, Inc.
Metromedia Paging Services, Inc.
Southwestern Bell Paging Services, Inc.
Southwestern Bell Telecommunications, Inc.
Tsunami Technologies Corporation
Southwestern Bell Telecom (UK) Ltd.

*Not wholly owned

Source: Texas PUC Docket 8585 First RFI JG-10 6-12-89

SOUTHWESTERN BELL PUBLICATIONS, INC.

- Southwestern Bell Media, Inc.
  - New York Yellow Pages, Inc.
  - Cityphone, Inc.
  - Manhattan Telephone Co., Inc.
  - Florida Yellow Pages, Inc.
  - New York Yellow Pages Blue Book, Inc.
  - VNM Foreign Sales Corporation
  - VNM Directory Support Services*
- Southwestern Bell Yellow Pages, Inc.
- Southwestern Bell Publications International, Ltd.
  - Silver Pages of Australia Pty, Ltd.
  - Sypress, Inc.*
    - Directory Technology Pty., Ltd.
    - Canadian Directory Technology, Ltd.*
  - Mast International, Ltd.
    - Australian Directory Services*
  - Automation CI Ltd.*
  - SBP Netherlands B.V.
    - Aurec Inforation and Directory Systems, Ltd.
    - Aurec, Ltd.*
      - Reshet 2000, Ltd.
      - Golden Wheels, Ltd.*
      - Telnuf, Ltd.*
        - Barak Screen Printing, Ltd.
        - Sheat OR Ltd.*
      - Aurec Gold Net, Ltd.
      - Golden Channels, Ltd.
      - This Week in Israel, Ltd.
      - Yellow Pages Publicity 1981, Ltd.
      - Elnet, Ltd.
      - Golden Ages Pages

Golden Pages Finance B.V.
Golden Pages Publications, Ltd.*
Amdocs, Inc.*
Amdocs Foreign Sales Corporation
Courtnay's Pty., Ltd.*
Credit Services Group Pty., Ltd.
Business Services Corporation Pty., Ltd.
Directories (TAS) Pty., Ltd.
Directories (OLD) Pty., Ltd.
Directories (AUST) Pty., Ltd.
Pink Pages Pty., Ltd.
Mast Advertising and Publishing Inc.
Blake Publishing Company, Inc.
Blake Chart Masters, Inc.
Blake Publishing of Alaska, Inc.
*Not wholly owned

Source: Texas PUC Docket 8585 First RFI JG-10 6-12-89

METROMEDIA PAGING SERVICES, INC. (DE)
- Beep Communication Systems, Inc.
- Birks County Communications, Inc.
- ICS Communications
  - Chalfone Communications
  - Global Paging, Inc.
  - Peak Rentals Incorporated
  - Kidd's Communications, inc.
  - RCS Incorporated
  - Salinas Valley Radio Telephone Company
- Metromedia Paging Services, Inc. (TX)
- Metromedia Telecommunications, Inc. (CA)
- Metromedia Telecommunications, Inc. (DE)
  - Page Alert Corp.
- Metromedia Telecommunications, Inc. (IL)
- Metromedia Telecommunications, Inc. (NH)
  - Comex, Inc.
- Metromedia Telecommunications, Inc. (VA)
  - Beeper, Inc.
  - American Tele Services, Inc. (MD)
    - American Tele Services of Georgia, Inc.
    - American Tele Services of Maryland, Inc.
    - American Tele Services of Washington, Inc.
    - American Radio Telephone Service, Inc. (MD)
    - Contact, Inc.
    - Contact of Washington, Inc.
    - Radio Phone Communications, Inc. (VA)
    - Arts of Virginia, Inc.
    - RP, Inc.
    - American Tele Services, Inc. (VA)
    - FGH, Inc.
    - RDG, Inc.

American Radio Telephone Services, Inc. (VA)
Arts Cellular Systems, Inc.
Mid Band Communications, Inc.
Mobile Phone Paging Radio Corp.
Radio Broadcasting Company
Radio Broadcasting Company of New York, Inc.
Radio Dispatch Co.
Radio Dispatch Company of New York, Inc.
Radiophone Corporation
Empire Paging Corp.
Cellular Telephone Corporation (DE)
Cellular Telephone Corporation (NV)
Radio Telephone Service, Inc.
RAM Broadcasting of Nevada, Inc.
RAM Broadcasting of New Mexico, Inc.
RAM Broadcasting of South Carolina, Inc.
RAM Florida Holdings, Inc.
RBC of Texas, Inc.
Rogers Radio Communications Services, Inc.
Rogers Communications Corp.
Metro Cellular Telecommunications
Metromedia Telecommunications, Inc. (IN)
Gary Cellular Telephone Company*
Cellular Telephones of Florida Corporation
Rogers Radiocall, Inc.
Yankee Telecom Corp.
Yankee Celltel Company
Worcester Telephone Company
Cellular Mobile Systems of the
District of Columbia, Inc.
Cellular Mobile Systems of Maryland, Inc.
Post Cellular Telecommunications DC/Maryland, Inc.

Washington/Baltimore Cellular Telephone Company
Rogers Telephone Answering Service, Inc.
SAM Communications Corporation
Ultracom, Inc.
Answer Phones, Inc.
Autophone of San Antonio, Inc.
Communication, Inc.
IMM, Inc.
Zip Call, Inc.
Budget Beeper Corporation
*Not wholly owned

Source: Texas PUC Docket 8585 First RFI JG-10 6-12-89

M12

Docket No. 8585
Office of Public Utility Counsel
Third Request
Information Request No. 45
07/26/89

45. Provide a description of each subsidiary/affiliate company of SWBC, stating in detail the activities each subsidiary engages in.

Answer: The attached document provides a description of the activities that the principal and secondary subsidiary/affiliate companies of SWBC perform. This includes a description of the activities performed by the corporate staff and the SWBC parent entity.

Responsible Person: John Tyler
Director-Strategic Business
Development Strategic Planning
Southwestern Bell Corporation
One Bell Center 40-Q-01
St. Louis, Missouri 63101

ATTACHMENT TO OPUC3-45

Southwestern Bell Corporation

Southwestern Bell Corporation is a family of growing companies offering communications services and products to customers on a regional, national and international basis. The Corporation has seven principal subsidiaries: Southwestern Bell Telephone Company, Southwestern Bell Publications, Inc., Southwestern Bell Telecommunications, Inc., Southwestern Bell Mobile Systems, Inc., Metromedia Paging Services, Inc., SBC Asset Management, Inc., and Gulf Printing Company. In addition, the Corporation has several smaller subsidiaries as well as a corporate staff.

PRINCIPAL SUBSIDIARIES

Southwestern Bell Telephone Company

Southwestern Bell Telephone Company (SWBT) is a telecommunications common carrier providing services in the states of Arkansas, Kansas, Missouri, Oklahoma and Texas. SWBT provides tariffed telecommunications services in Texas in accordance with and as described by its tariffs for local exchange services, general exchange services, intraLATA private line services, intraLATA long distance telecommunication services, intraLATA wide area telecommunication services, mobile telephone services Bellboy personal signaling services, dataphone digital services, customer specific pricing services and access services. SWBT also provides non-tariffed telecommunication services such as installation and repair of inside wire.

Southwestern Redevelopment Corporation II

Southwestern Redevelopment Corporation II was incorporated in Missouri on August 20, 1981, as Landmark Redevelopment Corporation. The purpose for its creation as stated in the Articles of Incorporation is to acquire, construct, maintain and operate a redevelopment project or projects in accordance with the provisions of the Urban Redevelopment Corporation Law of Mis-

souri. SWBT purchased Landmark on December 9, 1985. On January 10, 1986, the company's name was officially changed to Southwestern Redevelopment Corporation II. Through this subsidiary, SWBT may enjoy the benefits of real property tax abatement on the new computing and data processing center being built in St. Louis.

Bell Communications Research, Inc.

Bell Communications Research, Inc. (Bellcore) was incorporated in Delaware on October 20, 1983, as Central Staff Organization. Effective January 1, 1984, SWBT and the other Regional Bell Operating Companies (RBOCS) acquired ownership of this company. Its name was officially changed to Bell Communications Research, Inc. on February 6, 1984.

Each RBOC, including SWBT, owns one-seventh of Bellcore. Bellcore performs for SWBT services that can be performed most efficiently and economically on a centralized basis. The bulk of these services are of the technical support nature which can be divided into five areas: technology systems support, engineering and operations support, network planning, applied research, and information systems. In addition, there are four departments at Bellcore which provide non-technical services: Financial and Administrative Services, Market Research and Services, Legal, and Government Affairs.

Southwestern Bell Publications, Inc.

Southwestern Bell Publications (SBP) is the holding company for Southwestern Bell Media, Inc., Southwestern Bell Yellow Pages, Inc., and MAST Advertising & Publishing, Inc. and has no products or operational entities other than those of its subsidiaries. SBP's subsidiaries publish and sell advertising for Yellow Pages and specialty directories. The SBP subsidiaries also produce college directories, maps, and other printed and directory software materials. SBP's other direct subsidiary, Southwestern Bell Publications International, Ltd., is involved in the sale of Yellow Pages advertising for several Australian Telecom Yellow Pages direc-

tories. In addition, through a joint venture, SBP is involved in the marketing of a directory computer system that automates sales input procedures and contract processing.

Southwestern Bell Yellow Pages, Inc.,

Southwestern Bell Yellow Pages, Inc. (Yellow Pages) sells and produces advertising into yellow pages directories in Missouri, Oklahoma, Arkansas, Kansas, and Texas. It also has a contract with Southwestern Bell Telephone Company to produce its alphabetical white page directories. Sales are organized regionally with Missouri/Kansas and Oklahoma/Arkansas in the North Zone and Houston, Dallas and San Antonio in the Texas Zone. Staff and administrative services are centralized in St. Louis with graphics production in Dallas.

Yellow Pages is a highly regarded directory publisher with products which are perceived to be the most complete, accurate and the predominant directional advertising medium in any given market. This position has been attained through attention to quality and through creation of systems and skills which assure comprehensive content and universal delivery of the product to every home and business.

AD/VENT Information Services, Inc,

AD/VENT Information Services, Inc. (AVIS) ceased operations in June 1988 and merged into Southwestern Bell Media, Inc. later in the year. Prior to discontinuing operations AVIS sold and produced The Silver Pages which has also been discontinued, a senior citizens discount directory in 93 markets, and published Market Area Directories in New York, Chicago, Washington D.C., and Pinellas County Florida.

Southwestern Bell Media, Inc.

Southwestern Bell Media, Inc. ("Media") is the owner of copyrights for all Publications printed products. Prior to June 1988, Media was the purchasing, marketing and planning arm for Publications. Operational aspects of those functions were transferred to

Southwestern Bell Yellow Pages, Inc. along with the shutdown of AVIS.

MAST Advertising & Publishing, Inc,

The primary business of MAST Advertising & Publishing, Inc. ("HAST") is the marketing and publishing of Contel and other independent telephone company directories. Additional lines of business are:

National Yellow Pages Service (NYPS); provides a variety of marketing and media services to large national advertisers so that their complete directory advertising programs can be placed, monitored and billed through one authorized selling representative (ASR).

National Yellow Pages (Publishing); MAST acts as the publishing and billing agent for all national accounts that advertise in MAST and Southwestern Bell directories. ASR's will normally place the advertising for national accounts.

Worldwide Directory Product Sales (WDPS); is the organization that markets publishers' directories nationally and internationally. Marketing of the products/services is done through a mechanized telemarketing operation. WDPS also handles requests for subsequent local directories in the traditional five-state region.

Market Area Directories; The marketing and publishing of Yellow Pages directional advertising to a demographic niche not contiguous to a telephone company. These directories are usually overlaying several telephone company directories in a rural setting or they are carved out of a smaller suburb in a metropolitan market. MAST does not publish market area directories in areas served by Southwestern Bell Telephone Company.

Blake Publishing Company, Inc,

Blake Publishing, Inc. ("Blake") is a wholly-owned subsidiary of HAST Advertising and Publishing, Inc. Blake is a publisher of guides and maps in the United States. Blake also produces sponsored directories (Chamber of Commerce and the

Military). The company produces 150 products in twenty-seven states.

Southwestern Bell Publications International Ltd.

Southwestern Bell Publications International, Ltd. is currently operating internationally in two areas: a joint venture with Volt Information Services, in Australia, and with an ownership position in the Aurec Group of companies. A description of each of these operations follows:

Australia: The joint venture in Australia has two basic operations: Australian Directory Service (ADS), an organization which sells Yellow Pages advertising in the Telecom Australian directories and Volt and Media (VAM), an entity which owns the sales contract and customer data base systems.

Aurec Group: The Aurec Group has several operating entities; AMDOCS, the world leader in the development of directory publishing systems; Golden pages, the dominant Yellow Pages provider in Israel; Goldnet, an information and communication services provider; Maximedia previously referred to as Golden Wheels and Telruf, outdoor and transit advertising providers. Additionally, two new entities have been formed; Ya'aron Ltd., a real estate entity, and Golden Channels, a cable-TV company.

Southwestern Bell Telecommunications, Inc.

Southwestern Bell Telecommunications, Inc. (Telecom) markets telecommunications to both business and residential customers. Telecom offers a full range of products from basic telephones to sophisticated PBX systems. The company has two operating entities:

Business Systems Division (BSD)

BSD markets telecommunications systems to businesses via a premise sales force and a telemarketing department within SWBT's five-state territory. The divisions operations department provides installation and maintenance services for Telecom's customers as

well as performs inventory management and distribution functions for the division's product lines.

Freedom Phone Division

The Freedom Phone Division markets a line of proprietary products to consumers and small businesses through a network of independent sales representatives, as well as a network of authorized distributors. Freedom Phone is currently distributed through more than 16 thousand retailers and wholesalers in all 50 states, Puerto Rico and Canada. The Freedom Phone product line includes cordless, basic, designer, feature and home/office telephones, answering machines, key systems and telephone accessories.

Southwestern Bell Telecom (U.K.). Ltd.

Southwestern Bell Telecom U.K. was formed in 1987, as a corporation jointly owned by Telecom and minority partners in the U.K. The company distributes a full range of consumer products through retail channels in Great Britain. The company divides its business into three distribution channels; Retail, Wholesale, and Corporate. The subsidiary sources its products from Freedom Phone's vendors with modifications made for the marketplace in the United Kingdom.

Tsunami Technologies Corporation

Tsunami Technologies Corporation is now formally known as SB Telecom California Inc. The operations and assets of the company have.been sold and therefore the company is inactive.

Southwestern Bell Mobile Systems, Inc.

Southwestern Bell Mobile Systems, Inc. (SBMS) provides high quality, competitively priced mobile communication services and new radio-related services. SBMS provides cellular mobile radio telecommunications services to over 300,000 customers in 24 markets throughout the United States, including four of the top 10 nationwide and six of the top 15. SBMS is also engaged in the

sale and lease of cellular mobile customer premises equipment. It also engages in providing consulting services to other cellular service operators.

Metromedia Paging Services, Inc.

Metromedia Paging Services, Inc. (MPS) is a Radio Common Carrier (RCC), marketing personal communications services in most major metropolitan areas throughout the United States. MPS is the nations largest provider of paging service. With 38 office locations and approximately 2,000 licensed transmitters, MPS has the ability to provide paging services to approximately 444 of the nations population.

MPS offers a complete line of paging, or messaging, products from simple tone products with local coverage, to the alphanumeric display with nationwide coverage. In addition to paging service, MPS also markets the radio receiving device, or pager, needed by the customer to utilize the service. Customers have the option of purchasing or leasing the pagers.

MPS also provides certain mobile telephone services. The services include Improved Mobile Telephone Service (IMTS), Manual Mobile Telephone Service (MMTS and Specialized Mobile Radio (SMR). IMTS and MMTS are essentially the car telephones offered prior to the introduction of cellular technology.

SMR service is primarily a dispatch radio service principally used by fleet operations in the service sector of the economy. MPS operates SMR systems in the Chicago, Philadelphia, Texas and California markets.

Gulf Printing Company

Gulf Printing Company (Gulf) is a well established printer with a reputation for high quality products and services.

Gulf prints telephone directories for various subsidiaries of Southwestern Bell Publications, Inc. Gulf similarly produces printed materials for a divergent group of commercial accounts.

Times Journal Publishing Company

Times Journal Publishing Company (Times Journal) is a subsidiary of Gulf Printing Company and also provides commercial printing services. Times Journal has both a commercial plant and a directory plant. Times Journal prints telephone directories for MAST Advertising & Publishing, Inc. as well as other directory publishers nationwide. In addition, Times Journal prints a variety of other material such as, catalogs, direct mail packages, and miscellaneous material for general commercial accounts.

SBC Asset Management, Inc,

SBC Asset Management, Inc. (AMI) is a full service real estate and investment/development company. AMI consists of two lines of business: commercial real estate services and investment/development.

Within the commercial real estate services, AMI offers commercial brokerage services and handles SBC's home relocation plans, servicing employees relocating within the continental United States. Additional services include property management and design services consisting of interior design, space planning, and tenant build-out management services.

Within the investment/development, AMI actively evaluates and invests in real estate development opportunities.

The Golf Club of Oklahoma

The Golf Club of Oklahoma, Inc. is a subsidiary of SBC Asset Management, Inc. It is a "private members" only club located in Broken Arrow, Oklahoma. The Golf Club, which is situated on 525 acres of land is composed of, an 18-hole private golf course, four cottages, a 30-acre practice facility, and approximately 100 acres of undeveloped land.

OTHER SUBSIDIARIES

SBC Administrative Services, Inc,

SBC Administrative Services, Inc. is an administrative subsidiary whose purpose is to provide general human resource services including, but not limited to, benefit development and sales training to the parent company as well as the national subsidiaries.

Southwestern Bell Capital Corporation

Southwestern Bell Capital corporation ("Capital Corporation") is engaged principally in issuing debt securities and lending the proceeds to SBC and to certain subsidiaries of SBC other than Southwestern Bell Telephone Company. Capital Corporation currently lends monies to SBC Asset Management, Inc.; Southwestern Bell Telecommunications, Inc.; Gulf Printing company; Southwestern Bell Publications, Inc.; Southwestern Bell Mobile Systems, Inc.; and Metromedia Paging services, Inc.

SBC Corporate Services, Inc,

SBC Corporate Services, Inc. provides air transportation for the executives of the parent company and its subsidiaries.

Southwestern Bell Corporation - Washington, Inc.

Southwestern Bell Corporation - Washington, Inc. represents the interests of Southwestern Bell Corporation and each of its subsidiaries before the United States Congress, federal departments and administrative agencies (e.g., Department of Justice, Federal Communications Commission, Internal Revenue Service), industry trade groups and the U.S. District Court of the District of Columbia. This includes monitoring federal, legal, regulatory and political activity as well as promoting and presenting corporate positions to those pertinent legislative and regulatory bodies.

SBC Technology Resources, Inc,

SBC Technology Resources, Inc. (TRI) provides technology, direction and support for SBC and SBC's subsidiaries in order to

position SBC as the quality provider of leading edge communications products-and services at competitive prices. Research is focused on specific technologies which are considered strategic to the support of SBC's markets. TRI does not perform product-specific design and development for equipment, but rather performs research and develops generic requirements that can be provided to vendors to design and develop specific products. Core activities of TRI include: applications research (taking known scientific discoveries and determining if and how they can be utilized in the telecommunications environment) as well as specialized research into basic scientific principles; preparing general specifications for products; testing and evaluating manufacturer's designs and products to determine if they meet SBC requirements; and, writing applications software for computers with processing systems that have been designed to be user-programmed.

St. Louis Health Center, Incorporated

The St. Louis Health Center, Incorporated ("Health Center") is a health care provider operating in downtown St. Louis, Missouri, offering the public a full range of general at-patient medical and dental diagnostic and treatment services.

N1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

U. S. Metroline Services, Inc.,

Petitioner,

v.

Southwestern Bell Telephone Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFIDAVIT OF RAY G. BESING

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this date personally appeared Ray Besing, known to me to be the person whose name is signed to this Affidavit and who, by me being first duly sworn on his oath, stated upon his oath as follows:

1. My name is Ray G. Besing. I am a practicing attorney in Dallas, Texas; I am over the age of 21, of sound mind and memory, have never been convicted of any crime involving moral turpitude; and make this Affidavit upon my own personal knowledge. The facts hereinafter stated are true and correct. I am the attorney for Petitioner and have continuously represented Petitioner since the beginning of the antitrust litigation in the summer of 1989.

2. At oral argument in this case before the Fifth Circuit, on February 3, 1993 in Houston, Texas, I never stipulated or agreed

that the Fifth Circuit could review the dismissal of this case under Rule 12(b)(6) as if it were on appeal from the grant or denial of a summary judgment motion. Justice Reavely, during a colloquy about remand of the case and my view that there were no facts in the record to satisfy the second prong of *Midcal*, asked me if I thought summary judgment should be entertained, meaning by the district court. I replied in the affirmative. However, there was no suggestion by the Justice or other members of the panel — and certainly no assent by me — that the appeal could somehow be converted from an appeal of Rule 12(b)(6) motion to dismiss to an appeal of a Rule 56 motion for summary judgment.

3. Therefore, the following section of the Fifth Circuit's opinion rendered April 19, 1993 is not true:

> ...both parties stipulated at oral argument to this court that, in effect, we review the case as though it were before us on appeal from the grant or denial of a summary judgment motion.

4. No court reporter was present at the hearing from which I could obtain a transcript for submission to the Supreme Court in an Appendix to the Petition for Writ of Certiorari. However, pursuant to Local Rule 34.7, the Fifth Circuit is to tape record all oral arguments for the exclusive use of the Court but we cannot get it. See Appendix O.

5. During oral argument, I informed the Panel that, much earlier in the litigation, after the district court denied U.S. Metroline's motion for preliminary injunction, Respondent Southwestern Bell's attorney stated to me that Southwestern Bell would not cut off service to Petitioner if, within 10 days, I filed a complaint at the PUC. Respondent has fully documented that event in the Record before the Fifth Circuit, at R. 44, pp. 553-554, 575, 577. I told the Panel that Petitioner had done so under protest, in order to save its business. The issues designated for hearing in that proceeding, PUC Docket 9090, are not at all the same issues in this lawsuit. In that docket, the validity and lawfulness, for the future of Southwestern Bell's "resale prohibition" tariff was at issue; and whether

Southwestern Bell can terminate a customer's service when he has always paid his bill, under a PUC rule which restricts utility termination of service to customers. Attachment 1 to my affidavit is a true and correct copy of the PUC Administrative Law Judge's Order No. 8 which, specifically designates the issues that were presented at the hearing in early 1992.(Appendix N6) No decision has been issued on those issues, which do not deal with either damages or injunctive relief. Neither remedy is available at the PUC, under PURA, which limits the PUC's authority in contested cases to prospective relief only.

5. Earlier in the oral argument, when I urged the court panel to write an opinion consistent with the Supreme Court's reversal and remand in light of the *Ticor* decision, Justice Reavely interrupted to state to the effect that the court was not concerned about the remand and could easily find a way around it. I made no response.

Further affiant sayeth not.

/s/_____
Ray G. Besing

SWORN TO AND SUBSCRIBED BEFORE ME, this 15th day of July, 1993, to certify which, witness my hand and official seal.

[Seal]

/s/ Sandra Contreras_____
Notary Public In and For
the State of Texas

N4

Attachment 1

DOCKET NO. 9090

PUBLIC UTILITY COMMISSION OF TEXAS

COMPLAINT OF DFW METROLINE SERVICES AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY

ORDER NO. 8: GRANTING MOTION TO ESTABLISH PROCEDURAL SCHEDULE, RULING ON SCOPE, AND GIVING NOTICE OF PREHEARING CONFERENCE

After a lengthy period of abatement, Southwestern Bell Telephone Company (SWB), the respondent in this case, filed a Motion to Establish a Procedural Schedule Leading to a Hearing on the Merits. The complainant, U.S. Metro Line Services.,[1] opposes the motion. The order grants SWB's motion and rules on the scope of the proceeding.

The gist of U.S. Metro Line's argument is that it is presently involved as an intervenor in Docket Nos. 9618, 9640, and 9796. The scope and definition of "local exchange service" will be addressed in those dockets and in the staff's pending rulemaking Project No. 9708. Dockets Nos. 9618 and 9640 are presently abated until Docket No. 9796 is decided.

Part of U.S. Metro Line's complaint is that it is illegal for SWB to attempt, through its tariffs, to restrict local exchange service to the detriment of its competitors. Therefore, according to U.S. Metro Line, it would be wasteful to reactivate this case until the definition of local exchange service is determined in Docket 9796, the other dockets, and/or the rulemaking. U.S. Metro Line

---

[1] Since the complaint was filed, DFW Mertoline Services, a partnership, has become U.S. Metro Line Services, Inc.

also points out that it has limited resources and cannot afford to actively participate in this docket and the other proceedings.

SWB agrees that the definition of local exchange service will be clarified in the other proceedings. According to SWB, however, that definition is not at issue here. The real issue, according to SWB, is whether U.S. Metro Line is illegally providing service in ways contrary to the tariffs under which it is receiving service. SWB contends that U.S. Metro Line is wrongfully using the Radio Common Carrier and Centrex tariffs to provide interexchange service that should be taken under SWB's access service tariff.

In order to rule on this issue, the ALJ must determine the scope of Docket No. 9796 and the scope of this docket.

The scope of Docket No. 9796 was set forth in Examiner's Order No. 4 in that case:

> From a review of the pleadings the examiner has determined that the issues in this docket are: 1) whether the four named respondents are providing local exchange service as defined in the current Commission rule: and 2) whether the four named respondents should be required to cease and desist their operations until they obtain a certificate of convenience and necessity from the Commission. All other issues shall be deferred for consideration in Docket No. 9618, the generic proceeding.

U.S. Metro Line is not one of the four named respondents in Docket No. 9796. Nevertheless, its point would be well taken if it were in the same situation as those respondents, so that its fate would be determined by the decision in Docket No. 9796. It is not in the same situation, however. Although SWB is seeking to cut off U.S. Metro Line's existing service, SWB is not claiming that U. S. Metro Line is providing interexchange service between Dallas and Fort Worth, in violation of the tariffs under which it receives service from SWB. Neither U.S. Metro Line's situation nor SWB's reaction to it are the same as in Docket No. 9796.

The ALJ finds that the issues in this complaint case, Docket No. 9090, are as follows:

1) Whether U.S. Metro Line is in violation of the tariffs under which it is receiving service from SWB;

2) Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provision of law, within the meaning of PURA Section 42;

3) If the answers to the first two questions are in SWB's favor, whether SWB should be permitted to terminate U.S. Metro Line's existing service under those tariff provisions pursuant to P.U.C. SUBST. R. 23.46.

Because the issues in this complaint are not the same as those raised in the other pending dockets in which U.S. Metro Line is involved, SWB's motion in GRANTED. Pursuant to P.U.C. PROC. 21.83, a prehearing conference will be held in this docket beginning at 10:00 a.m. Wednesday, July 24, 1991. The following matters will be considered at the prehearing conference:

1) resolution of pending motions;

2) establishment of a procedural schedule, including deadlines and procedures for discovery and the prefiling of testimony;

3) setting of the hearing on the merits.

SIGNED AT AUSTIN, TEXAS, on this the 3rd day of July, 1991.

PUBLIC UTILITY COMMISSION OF TEXAS

/s/
HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

01

IN THE

Supreme Court of the United States

October Term, 1993

U. S. Metroline Services, Inc.,

Petitioner,

v.

Southwestern Bell Telephone Company,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AFFIDAVIT OF ROBERT W. TAYLOR

STATE OF TEXAS
COUNTY OF DALLAS

BEFORE ME, the undersigned authority, on this date personally appeared Robert W. Taylor, known to me to be the person whose name is signed to this Affidavit and who, by me being first duly sworn on his oath, stated upon his oath as follows:

1. My name is Robert W. Taylor. I am a practicing attorney in Dallas, Texas; I am over the age of 21, of sound mind and memory, have never been convicted of any crime; and make this Affidavit upon my own personal knowledge. The facts hereinafter stated are true and correct.

2. I have read Local Rule 34.7 of the Fifth Circuit Court of Appeals which states that all oral arguments are tape recorded for the exclusive use of the court.

3. Nonetheless, On July 12, 1993, I telephone Allison Granier, Deputy Clerk of the Fifth Circuit Court of Appeals, to

request a transcript of the oral argument held before the Fifth Circuit in this case. I explained to her that the Fifth Circuit, in its April 19, 1993 opinion, stated that Petitioner's Counsel Ray G. Besing stipulated that the Fifth Circuit would hear the appeal as if it was an appeal from the grant or denial of a summary judgment motion, and that Mr. Besing never made such a stipulation, and therefore Petitioner needed to have a transcript of the oral argument to show that Mr. Besing never made such a stipulation.

4. Ms. Granier would not agree to let Petitioner obtain a transcript or a copy of the tape from which to make a transcript, despite the above explained circumstances.

Further affiant sayeth not.

/s/_____
Robert W. Taylor

SWORN TO AND SUBSCRIBED BEFORE ME, this 12th day of July, 1993, to certify which, witness my hand and official seal.

[Seal]

/s/ Sandra Contreras
Notary Public In and For
the State of Texas

Southwestern Bell Telephone
One Bell Plaza
Room 2750
Dallas, TX 75202
214-464-1381

John D. Iven
Manager-Interexchange
Customer Service Center

June 8, 1989

TERMINATION NOTICE

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Greg Cunningham
DFW Communications, Inc.
DBA Metroline Services, Inc.
6688 N. Central Expressway, Suite 1410
Dallas, Texas 75206

Dear Mr. Cunningham:

This letter is to advise you Southwestern Bell Telephone will suspend the RCC services, billed on telephone number 641-8840, which you agreed in our May 23, 1989 meeting were being primarily used to resell Local Exchange Service. As stated in previous letters and meetings, the use of RCC services in this manner is in violation of our Texas General Exchange Tariff.

The General Exchange Tariff, Section 21, Sheet 18, Paragraph 13.1.1, describes how a Radio Common Carrier (RCC) may utilize DID numbers and DINV trunks for their authorized one-way signaling and/or two-way dial mobile service.

RCC's are not permitted to resell Local Exchange Service, other than as specifically set forth above. Extended Metropolitan Service (EMS) is a type of Local Exchange Service and consequently cannot be resold on an exchange basis.

Therefore, Southwestern Bell Telephone will suspend service on the above RCC services thirty (30) days from receipt of this letter.

If you have questions regarding this matter, I can be reached on 214-464-1381.

Sincerely,

/s/_____
John Iven

cc: Dr. Douglas L. Laird
3913 Windview Drive
Colleyville, Texas 76034

Public Utility Commission of Texas
7800 Shoal Creek Blvd., Suite 450N
Austin, Texas 78757

Federal Communications Commission
Attn: Mr. Gregory Vogt
1919 M Street, Room 644
Washington, D.C. 20554

Mr. Ray Besing, Attorney
12221 Merit Drive, Suite 1430
Dallas, Texas 75251

Supreme Court, U.S.
FILED
AUG 18 1993
OFFICE OF THE CLERK

No. 93-99

In The

Supreme Court of the United States

October Term, 1993

U.S. METROLINE SERVICES, INC.,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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4083
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RESPONSE TO QUESTIONS PRESENTED

1. The Fifth Circuit did not err in applying the law of the case doctrine in concluding the first prong of the *Midcal* test had been met.

2. The Fifth Circuit correctly relied on clear Texas law in finding that the *Midcal* first-prong ("clear articulation") test of state action immunity had been met.

3. Whether viewed as affirming a dismissal under Fed. R. Civ. P. Rule 12 (b) (6) or a summary judgment under Rule 56, the Fifth Circuit's handling of the appeal on remand was consistent with decisions of the other federal circuits and did not prejudice Petitioner USM.

4. The Fifth Circuit correctly concluded that the specific conduct complained of by Petitioner is being actively regulated by the Texas PUC.

5. Certiorari is not appropriate to review inferior courts' analysis of the facts.

6. The affidavits submitted by USM's counsel, while irrelevant, are not appropriately considered by this Court because they were not part of the record below.

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II. The Fifth Circuit correctly relied on clear Texas law in finding that the *Midcal* first-prong ("Clear articulation") test of state action immunity had been met. 11

III. Whether viewed as affirming a dismissal under Fed. R. Civ. P. Rule 12(b)(6) or a Summary Judgment under Rule 56, the Fifth Circuit's handling of the appeal on remand was consistent with decisions of the other federal circuit's and did not prejudice Petitioner USM. 14

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APPENDIX

Appendix Q — Docket 9090, Order No. 4 ..... 1a

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No. 93-99

In The

Supreme Court of the United States

October Term, 1993

U.S. METROLINE SERVICES, INC.,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Southwestern Bell Telephone Company ("SWBT")[1] provides

1. Per Supreme Court Rule 29.1, Respondent Southwestern Bell Telephone Company states that it is a wholly-owned subsidiary of its parent, Southwestern Bell Corporation. Southwestern Bell Corporation is a publicly-

(Cont'd)

telecommunications services in Texas pursuant to a Certificate of Convenience and Necessity issued by the Public Utility Commission of Texas ("Texas PUC"). SWBT's franchised service areas include parts of the Dallas-Ft. Worth "Metroplex." Calls between SWBT's Dallas and Ft. Worth local telephone exchanges are ordinarily toll calls in accordance with SWBT's tariffs filed with and approved by the Texas PUC.

U.S. Metroline Services, Inc. ("USM") (formerly DFW Metroline Services) and SWBT each offer a form of flat-rate calling between the Dallas and Ft. Worth exchanges. SWBT's tariffed service is called "Extended Metropolitan Service" ("EMS"). For an additional monthly charge for the optional EMS service, SWBT customers enjoy an expanded toll-free calling scope of the two exchanges without incurring usage-sensitive long-distance charges. By tariff, the EMS service offered by SWBT for the expanded Dallas-Ft. Worth calling scope is available only to customers located in the areas abutting these two exchanges. Customers who want EMS Service from SWBT but are not located in these discrete areas must, by tariff, pay a mileage fee to connect their premises with the nearest SWBT central office providing EMS service. In addition, such customers must pay the tariffed EMS rate as approved by the Texas PUC.

USM is not regulated by the Texas PUC and offers a flat-rate calling service to residents of the Dallas-Ft. Worth area which USM refers to as "metro service." Metro service enables USM's customers to avoid payment of long-distance and mileage charges for calls between those two cities. In providing its metro service, USM uses certain SWBT tariffed services.

(Cont'd)
traded corporation listed on the NYSE. Bell Communications Research, Inc. ("Bellcore") is a subsidiary jointly owned by SWBT and the former Bell Operating Companies pursuant to the AT&T Plan of Reorganization in *United States v. Western Electric Co. et al.*

SWBT complained that USM makes improper use of SWBT's tariffed services in order to provide its metro service, in violation of SWBT's Texas PUC-approved tariffs. SWBT conducted a routine audit of USM in late 1988-1989. Such audits are conducted in order to ensure SWBT's tariffed services are being used in conformance with its approved tariffs, because SWBT may not discriminate among its customers in the provision of tariffed services, per Section 45 of the Texas Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Ann. Art. 1446c, § 1, *et seq.* (Vernon Supp. 1992). Permitting USM to pay less than the applicable tariffed rate paid by other customers would constitute impermissible discrimination by SWBT.

This audit established USM was "reselling" local exchange services obtained from SWBT, in order to provide USM's outbound interexchange service, thereby violating the resale prohibition contained in SWBT's General Exchange Tariff.[2] The audit further established that USM was providing interexchange (*i.e.*, long distance) service without paying the access charges applicable to interexchange carriers under SWBT's Texas PUC-approved Access Service Tariff, which contains no resale prohibition. In setting rates, the Texas PUC, as a matter of public policy, has directed that tariffed access service rates shall be higher than tariffed local exchange service rates.

On March 9, 1989, SWBT wrote informing USM of its misuse of SWBT's services. After discussions with USM, SWBT ultimately sent USM a termination notice scheduled to be effective July 11, 1989. On July 6, 1989, USM filed suit in the United States District Court for the Northern District of Texas, in Dallas, alleging the threatened termination of SWBT services

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2. SWBT's General Exchange Tariff contains a resale prohibition applying to all local exchange customers. There is no "resale prohibition tariff" as stated at page 3 of the Petition.

violated the federal antitrust laws, 15 U.S.C. § 1, *et seq.* On August 30, 1989 the district court denied USM's motion for a preliminary injunction (Appendix H, USM's Brief), and the denial was affirmed by the Fifth Circuit on May 29, 1990. *DFW Metro Line Serv. v. S.W. Bell Telephone Co.*, 901 F.2d 1267 (5th Cir. 1990) (*"Metro I"*), *rehearing denied*, 908 F.2d 971, *cert. denied*, 498 U.S. 985 (1990). (Appendix G to USM's Brief.)

On February 27, 1991, the district court granted SWBT's Motion to Dismiss for Failure to State a Claim, on state-action immunity grounds (Appendix E to USM's Brief.) On appeal, this order was also affirmed by the Fifth Circuit on October 23, 1991. *D.F.W. Metro Line v. S.W. Bell Telephone*, 947 F.2d 1486 (5th Cir. 1991) (unpublished *per curiam* opinion) (*"Metro II"*). (Appendix D to USM's Brief.) USM petitioned this Court for writ of certiorari.

On June 12, 1992, this Court decided *Federal Trade Commission v. Ticor Title Insurance*, 504 U.S.___, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992) (*"Ticor"*). (Appendix C to USM's Brief.) Ten days later, this Court granted the writ, vacated *Metro II* and remanded this case to the Fifth Circuit for further consideration in light of *Ticor. Metroline Services, Inc. v. Southwestern Bell Telephone Co.*, __ U.S.___, 112 S. Ct. 2987, 120 L. Ed. 2d 865 (1992). (Appendix B to USM's Brief.)

On remand, the Fifth Circuit again affirmed the dismissal for failure to state a claim, finding both prongs of the *Midcal*[3] state action immunity test were met, as required by *Ticor. DFW Metro Line v. Southwestern Bell*, 988 F.2d 601 (5th Cir. 1993) (*"Metro III"*).

As the Fifth Circuit recognized in *Metro III*, this is not the only

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3. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*"Midcal"*).

proceeding in which these parties are litigating this dispute. On October 4, 1989, just over one month after the district court denied its request for injunctive relief, USM filed a General Complaint and Application for Interim Relief with the Texas PUC. In the Texas PUC proceeding (Texas PUC Docket 9090), USM seeks an order from the Texas PUC: (1) preventing SWBT from disconnecting USM's service, and (2) determining that SWBT's threatened conduct constitutes "violations of law." On December 1, 1989, an administrative law judge for the Texas PUC entered Prehearing Order No. 4. (Appendix Q to this Brief). In Order No. 4, the Texas PUC ordered that "While this complaint is pending before the Commission, SWB[T] shall not terminate service to [USM] and shall provide new telephone lines and numbers to [USM] upon request."

Subsequently, in Order No. 8 (Appendix R to this Brief), the Texas PUC administrative law judge determined that the issues in Docket 9090 were:

> 1. Whether U.S. Metroline is in violation of the tariffs under which it is receiving service from SWB;
>
> 2. Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provisions of law, within the meaning of PURA, § 42;
>
> 3. If the answers to the first two questions are in SWB's favor, whether SWB should be permitted to terminate U.S. Metroline's existing service under those tariff provisions pursuant to P.U.C. Subst. R., 23.46.

Texas PUC Docket 9090 is still active and pending (*See* Texas

PUC Docket No. 9090, Order No. 36 (June 18, 1993) (Appendix S to this Brief). As of the date of this brief, SWBT has not terminated service to USM, and USM continues to receive service, pursuant to the Texas PUC's order.[4]

SUMMARY OF ARGUMENT

This is an unexceptional case in which the court of appeals applied settled principles of law to clear facts. The case is notable only because the facts below so squarely conform to this Court's two-prong *Midcal* test for state-action immunity as clarified in *Federal Trade Commission v. Ticor Title Insurance Co.*, 504 U.S.___, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992). The Texas regulatory scheme is clearly articulated, and Texas is actively supervising Respondent SWBT's conduct in a pending administrative docket.

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) and *Ticor* provide that state-action immunity under the federal antitrust laws must be supported by: (1) a clearly articulated affirmative state policy to displace competition and allow the conduct challenged as anticompetitive, and (2) active supervision of the conduct undertaken by the private actor.

Both of these elements are, without any question, present here. Texas has enacted PURA, which by its explicit terms has the objective that regulation of public utilities in Texas substitutes for competition. Texas actively and comprehensively regulates public

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4. On June 4, 1993, USM also filed suit in Texas State District Court for Dallas County, alleging, *inter alia*, that SWBT's threatened conduct violates the Texas Free Enterprise & Antitrust Act, Tex. Bus. & Com. Code Ann. § 15.02, *et seq.* (Vernon Supp. 1993). The case is docketed as No. 93-05990-I, 162nd Judicial District Court, Dallas, Texas. (Appendix T to this Brief.)

utilities and the Texas PUC is at this time directly involved in regulating the specific conduct of SWBT which is the subject of this dispute. In fact, the Texas PUC has prohibited SWBT from taking the steps complained of by Petitioner USM pending the PUC's final resolution of PUC Docket 9090.

Texas policy, and the active regulation of SWBT's conduct, are matters of public record and were appropriately noticed by the Fifth Circuit. Both the district court and the Fifth Circuit concluded there is clear state policy, that Texas actively enforces that policy and regulates the specific conduct in question, and that USM had full opportunity to, and did in fact, respond to SWBT's asserted claim of immunity.

This is a case where the Fifth Circuit applied settled law to state action which is a matter of public record. This case involves no unsettled areas of federal law, nor any legitimate dispute as to the facts. There is simply nothing about this case that would warrant granting USM's petition. SWBT respectfully requests that this Court deny the petition.

REASONS FOR DENYING THE WRIT

I.

THE FIFTH CIRCUIT DID NOT ERR IN APPLYING THE LAW OF THE CASE DOCTRINE IN CONCLUDING THE FIRST PRONG OF THE *MIDCAL* TEST HAD BEEN MET.

The law of the case doctrine generally forecloses a court from reconsidering issues that have been "decided explicitly or by necessary implication in [the] previous disposition." *Milgard Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703, 715 (9th Cir. 1990); *Knotts v. United States*, 893 F.2d 758 (5th Cir. 1990).

This rule "promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.' " *Christianson v. Colt Industries,* 486 U.S. 800, 816 (1988). While the doctrine is not a limit on a court's authority:

> It is, however, a rule of practice that has been more or less strictly followed. Generally when a litigant has presented an issue on the first appeal, and it has been fully briefed and squarely decided . . . it would not serve a useful purpose to permit the party to present the same issue again simply because to determine other matters the case must return to the Court of Appeals.

1B *Moore's Federal Practice* ¶ 0.404 [1] at II-4 (1993).

Although the Fifth Circuit had the power to revisit its prior decision in this case, "prior decision of legal issues should be followed unless there is substantially different evidence at a subsequent trial, new controlling authority, or the prior decision was clearly erroneous and would result in injustice." *Beneficial Life Ins. Co. v. Knobelauch,* 653 F.2d 393 (9th Cir. 1981); *see also, Wyoming v. Oklahoma,* 502 U.S.___, 112 S. Ct. 789, 117 L. Ed. 2d 1, 17 (1992) (citing *Arizona v. California,* 460 U.S. 605 (1983) (prior rulings, even in original jurisdiction cases, "should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.")

In its decision in *Metro I,* the Fifth Circuit specifically held:

> As an additional basis for our holding, we find that Southwestern Bell is immune from the antitrust liability alleged in DFW's Complaint

> under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943), as applied to private State-regulated rate making by *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985). Southwestern Bell clearly meets the two-prong test set out in *California Retail Dealer's Assn. v. Midcal Aluminum, Inc.* 445 U.S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). There is no, therefore, likelihood of success on the merits in the instant case.

Metro I, 901 F.2d at 1269 n. 6.

After the Fifth Circuit affirmed dismissal of this suit in *Metro II*, this Court directed the Fifth Circuit to reconsider its decision "in light of *Federal Trade Commission v. Ticor Title Insurance*, 504 U.S.___, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)." *Ticor* explained the two-part test that must be satisfied for state action immunity under the federal antitrust laws as previously set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*"Midcal"*).

> *Ticor* noted:
>
> > A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct and second, the State provides active supervision of anticompetitive conduct undertaken by private actors.

504 U.S. ___, 112 S. Ct. at 2175, 119 L. Ed. 2d at 421 (1992).

This Court specifically noted that the first part of the *Midcal* test was not at issue in *Ticor. Id.* The Fifth Circuit correctly concluded that this Court had not made any change in the first part of the *Midcal* test. *Metro III,* 988 F.2d at 604. It was, therefore, appropriate for the court to apply the law of the case doctrine to the first prong of the *Midcal* test inasmuch as the Fifth Circuit's previous decision had not been nullified by this Court in *Ticor,* nor had there been any change in the facts. *See* 1B *Moore's Federal Practice* ¶ 0.404[1] at II-25 (1993); *Reid v. Rolling Fork Pub. Utility Dist.,* 979 F.2d 1084, 1086 (5th Cir. 1992); *Yeager's Fuel, Inc. v. Penn. Power & Light Co.,* 804 F. Supp. 700, 706 n. 8 (E.D. Pa. 1992). The first prong of the *Midcal* test was clearly and explicitly addressed by the Fifth Circuit in *Metro I,* quoted above. 901 F.2d at 1269 n. 6. As noted in *Milgard Tempering, Inc. v. Selas Corp. of America,* 902 F.2d 703, 715 (9th Cir. 1990), the ultimate question is whether a court has abused its discretion in applying the law of the case doctrine. *Milgard* noted that reconsideration of a previously decided issue is appropriate in only three instances: (1) the first decision was clearly erroneous and would result in manifest injustice; (2) an intervening change in the law has occurred; or (3) the evidence on remand was substantially different. *Milgard,* 902 F.2d at 715.

Upon remand of this case to the Fifth Circuit, there was neither intervening change in the law nor was there any different evidence concerning application of the first prong of the *Midcal* test. The question, therefore, is whether the Fifth Circuit was "clearly erroneous" in concluding that the challenged restraint was clearly articulated and affirmatively expressed as state policy. As discussed in the next section, the Fifth Circuit's conclusion concerning Texas' articulation of state policy was not clearly erroneous, but correct.

II.

THE FIFTH CIRCUIT CORRECTLY RELIED ON CLEAR TEXAS LAW IN FINDING THAT THE *MIDCAL* FIRST-PRONG ("CLEAR ARTICULATION") TEST OF STATE ACTION IMMUNITY HAD BEEN MET.

The Texas PURA clearly articulates and affirmatively expresses the policy of Texas concerning the regulation of public utilities:

> § 2. This Act is enacted to protect the public interest inherent in the rates and services of public utilities. The legislature finds that public utilities are by definition monopolies in the areas they serve; that therefore the normal forces of competition which operate to regulate prices in a free enterprise society do not operate; and that therefore utility rates, operations and services are regulated by public agencies, *with the objective that such regulation shall operate as a substitute for competition.* The purpose of this Act is to establish a comprehensive regulatory scheme which is adequate to the task of regulating public utilities as defined by this Act, to assure rates, operations, and services which are just and reasonable to consumers and to the utilities. (emphasis added)

PURA, Tex. Rev. Civ. Stat. Ann. Art. 1446c, § 2.

This is conceded by Petitioner in its brief at 7:

Texas PURA is a unique utility regulatory

> statute, for it announced new policies and provided new tools to accommodate (i) necessary regulation of dominant utilities operating in a monopoly market, on the one hand, with (ii) protections and encouragement of competitive businesses and markets, on the other hand.

PURA §18(a) further specifies the State of Texas' policy concerning telecommunications utilities:

> §18(a) It is the policy of this state to protect the public interest in having adequate and efficient telecommunications service available to all citizens of the state at just, fair and reasonable rates. The legislature finds that the telecommunications industry through technical advancements, federal, judicial and administrative actions, and the formulation of new telecommunications enterprises has become and will continue to be in many and growing areas a competitive industry which does not lend itself to traditional public utility regulatory rules, policies, and principles; and that therefore, the public interest requires that new rules, policies, and principles be formulated and applied to protect the public interest and to provide equal opportunity to all telecommunications utilities in a competitive marketplace. It is the purpose of this section to grant to the Commission the authority and the power under this Act to carry out the public policy herein stated.

SWBT is a "telecommunications utility" which is also a "dominant carrier" for purposes of PURA. PURA §§ 3(c)(2)(a) and 2(b). As such, the Texas PUC is given exclusive jurisdiction over SWBT's business and property, and SWBT is required to file proposed tariffs describing all rates, rate structures, regulations and rules before it may offer service to the public. PURA §§ 18(a) and (b). The Texas PUC reviews SWBT's operations and allows such rates, rate structures and regulations to become effective only if they are just, fair and reasonable and comply with the public interest. *Id.* If the Texas PUC, after investigation, concludes the tariff of a dominant carrier (such as SWBT) doesn't comply with PURA, the PUC may order the tariff canceled, or modified. PURA §§ 16(a), 37, 42, 43(f). It is unlawful for SWBT to charge rates not authorized by its approved tariffs. PURA § 31.

The Texas PUC has and exercises quasi-judicial powers: The PUC holds hearings, administers oaths, receives evidence at hearings, issues subpoenas to compel attendance of witness and production of papers and documents, grants interim relief, and makes findings of fact and decisions with respect to administering the provisions of PURA. PURA § 16(a). Persons affected by conduct of a public utility may (and do) file complaints (as USM has done in Texas PUC Docket 9090) (PURA § 83(a)); an affected person may complain of any alleged anticompetitive or discriminatory practices of a public utility. PURA § 47. The PUC may enjoin violations of its regulations through legal action brought by the Texas Attorney General (PURA §§ 71-77), and appeals from PUC orders may be taken to the state district courts. PURA § 69.

This detailed statutory scheme for regulating public utilities such as SWBT clearly meets *Midcal's* first prong "clear articulation" test. The arguments in Section 2 of USM's petition concerning the legislative intentions embodied in PURA do nothing but provide further evidence of the Texas regulatory

scheme.[5] The Fifth Circuit's evaluation of the first prong of *Midcal* was correct.

III.

WHETHER VIEWED AS AFFIRMING A DISMISSAL UNDER FED. R. CIV. P. RULE 12(b)(6) OR A SUMMARY JUDGMENT UNDER RULE 56, THE FIFTH CIRCUIT'S HANDLING OF THE APPEAL ON REMAND WAS CONSISTENT WITH DECISIONS OF THE OTHER FEDERAL CIRCUITS AND DID NOT PREJUDICE PETITIONER USM.

Petitioner's first and fifth points really raise the same issue, namely that the Fifth Circuit converted Respondent's Rule 12(b)(6) Motion to Dismiss into a Motion for Summary Judgment without providing Petitioner notice and opportunity to respond. (*See*, USM's Brief at 8-10 and 26-28).

Procedurally, after initial proceedings in which the district court denied USM's Motion for Preliminary Injunction, the district court granted SWBT's Motion to Dismiss for failure to state a claim on the ground that the state action doctrine immunized Respondent's conduct.[6] The district court's *dismissal* was affirmed by the Fifth Circuit in its October 23, 1991 Order. (*Metro II*,

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5. USM's arguments in Section 2 of its brief concerning how PURA should be interpreted and how the PUC is to implement PURA are irrelevant. In determining the applicability of state-action immunity, the question "is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Ticor*, 504 U.S.___, 112 S. Ct. at 2177, 119 L. Ed. 2d at 423.

6. The Fifth Circuit noted that this case came from the district court "with an extensive record, developed in detail during the proceedings for injunctive relief." *Metro III*, 988 F.2d at 603.

Appendix D to Petitioner's Brief.) After remand by this Court, the Fifth Circuit again affirmed that the district court's *dismissal* of USM's claim was correct and affirmed that dismissal. (*Metro III*, Appendix A to USM's Brief.)

First, USM incorrectly contends immunity is an affirmative defense that may not be raised in a Motion to Dismiss. An affirmative defense such as immunity may properly be considered under Fed. R. Civ. P. Rule 12(b)(6) as a Motion to Dismiss for failure to state a claim. *Quezada v. County of Bernalillo*, 944 F.2d 710 (10th Cir. 1991); *Jackson v. Taylor*, 539 F. Supp. 593 (D.D.C. 1982), *aff'd*, 713 F.2d 865 (D.C. Cir. 1983); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F. Supp. 451 (D. Me. 1992), *aff'd in part and remanded in part*, __ F.2d __, 1993 WL 245976 (1st Cir. July 13, 1993); *Aerotrade, Inc. v. Republic of Haiti*, 376 F. Supp. 1283 n. 7 (S.D.N.Y. 1974). This is especially true where the opposing party raises no genuine issues of material fact. *Scott v. Kuhlman*, 746 F.2d 1377 (9th Cir. 1984).

Liffiton v. Keuker, 850 F.2d 73 (2nd Cir. 1988), cited by USM, is distinguishable. *Liffiton* held an immunity defense would not support dismissal when further factual information was necessary. As demonstrated in point 4 of this brief, USM can prove no set of facts that would show that Texas does not have a clearly articulated regulatory policy, or that the Texas PUC is not actively regulating the specific conduct of SWBT at issue.

In affirming the dismissal based on state action immunity, the Fifth Circuit took judicial notice of matters of public record and Petitioner had ample opportunity to respond and submit responsive materials.

Concerning the first prong of the *Midcal* state action immunity test, the Fifth Circuit concluded the challenged restraint was clearly articulated and affirmatively expressed as state policy

by reference to state statutory language. (*Metro III*, 988 F.2d at 605). The district court's initial Memorandum Order (Appendix H) specifically referenced the articulation of the Texas policy as embodied in PURA:

> Texas has clearly articulated a policy to regulate telephone rates. In § 18 of the Public Utility Regulatory Act ("PURA"), Tex. Rev. Civ. Stat. Art. 1446(c) (Vernon Supp. 1989), the legislature has stated that there is a policy of overseeing the telecommunications industry so as to promote competitiveness and that the Public Utility Commission ("PUC") shall regulate all telecommunications rates so as to ensure that they are just, fair, and reasonable. The statute also provides that the PUC shall have exclusive original jurisdiction over the business and property of the telecommunications utilities. *Id.* Moreover, § 18(c)(2) provides that the PUC shall investigate as needed to ensure competitiveness within the telecommunications market. Likewise, § 37 provides that the PUC shall set rates, and § 43 states that no utility may make any rate changes unless the PUC approves them. Thus, the challenged activity, namely the setting of lower rates for RCC-DID service and much higher rates for General Access Service, has been undertaken pursuant to state policy.

(Appendix p. H4 to USM's Brief.)

The Fifth Circuit's analysis of the second prong of the *Midcal* test similarly relied on matters of public record appropriate for judicial notice: the Texas PURA and a variety of reported Texas PUC decisions concerning PUC regulation of the activities of

SWBT. *Metro III,* 988 F.2d at 606. In addition to the public record, the court of appeals noted that the record in this case "reflects numerous references to the PUC's inquiry into the reasonableness of Bell's rates, in Docket 8585 filed January 4, 1989." *Id.* Finally, the Fifth Circuit noted:

> Most importantly, Metro [USM] and Bell [SWBT] filed a joint pleading recognizing that, while this suit was pending, the PUC was adjudicating the *very same issues* presented in the instant case. In fact, the very same attorneys participated in the state proceedings in January 1992. It is ludicrous, almost to the point of frivolity, for Metro to contend that the PUC does not actively supervise the conduct in question given the fact that Metro and Bell are awaiting a PUC decision on Bell's actions "as we speak."

988 F.2d 606-607. (*See also,* Appendix R, setting forth the ALJ's statement of issues pending in Dkt. 9090 before the Texas PUC.)

The Fifth Circuit's consideration of these matters of public record was appropriate. In a motion for judgment on the pleadings, or in a motion to dismiss pursuant to Rule 12(b), the Court may take judicial notice of additional facts where appropriate without converting the proceeding into a Rule 56 Motion for Summary Judgment. *MGIC Indemnity Corp. v. Weisman,* 803 F.2d 500, 504 (9th Cir. 1986); *United States v. Woods,* 925 F.2d 1580 (7th Cir. 1991); *Southmark Prime Plus, L.P. v. Falzone,* 776 F. Supp. 888, 891-92 (D. Del. 1991). Among the matters a court may judicially notice are records and reports of administrative bodies, such as the Texas PUC and matters of general public record. *Intermedics, Inc. v. Ventritex, Inc.,* 775 F. Supp. 1258, 1261 (N.D. Cal. 1991) (citing *Interstate Natural Gas Co. v. Southern California Gas Company,*

209 F.2d 380, 385 (9th Cir. 1953)); *Tri-State Rubbish, Inc. v. Waste Management, Inc.*, 803 F. Supp. 451, 455-56 (D. Me. 1992); *Yeater's Fuel, Inc. v. Penn. Power & Light Co.*, 804 F. Supp. 700, 707-10 (E.D. Pa. 1992); *Southmark Prime Plus, L.P. v. Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991).

Even were USM entitled to notice that this matter was to be considered as an appeal from a ruling on a Rule 56 motion for summary judgment[7], there is no error because USM had been given full opportunity to address the matters relied on by the court. The Texas statutory and administrative records noticed by the Fifth Circuit were also cited in Petitioner's pleadings at the district court, in its appellate briefs in the Fifth Circuit; in its initial 1991 Petition for Writ of Certiorari in this Court; and in its detailed "Plaintiff's Brief, Proposed Findings of Fact and Conclusions of Law and Supporting Evidence," filed with the district court on August 4, 1989. Given Petitioner's extensive briefing of the state immunity issues, Petitioner cannot contend it was taken by surprise or deprived of a reasonable opportunity to submit materials outside the pleadings. *See, e.g., In re G. & A. Books, Inc.*, 770 F.2d 288, 295 (2d Cir. 1985), *cert. den., MGM Exhibitors, Inc. v. Stern*, 475 U.S. 1015 (1986); *Kaestel v. Lockhart*, 746 F.2d 1323, 1324 (8th Cir. 1984); and cases cited in *2A Moore's Federal Practice*, ¶ 12.09[3], p. 12-80, n. 8 and 1992-1993 cumulative supplement, pp. 168-175.

The district court did not abuse its discretion and correctly dismissed USM's action without further discovery or proceedings because the judicially noticed facts were clear. Further proceedings would have been futile and a waste of judicial

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7. Note the status of the *record below* is that the Fifth Circuit obtained stipulations from the parties to review the case "as thought it were before us on appeal from the grant or denial of a summary judgment motion." *Metro III*, 988 F.2d at 603.

resources. *Mullis v. U. S. Bankruptcy Court for Dist. of Nev.*, 828 F.2d 1385, 1387 n. 6 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988). USM has failed to show that further proceedings in this case would somehow lead to the discovery of issues of material fact, or to a different result. *R. Ernest & Cohn, D.C., D.A.B.C.O. v. Bond*, 953 F.2d 154, 159 (4th Cir. 1991), *cert. denied*, __ U.S. __, 112 S. Ct. 3057, 120 L. Ed. 2d 922 (1992); *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984); *Pub. Srvc. Co. of New Hampshire v. Hudson Light and Power Dept.*, 938 F.2d 338, 346 (1st Cir. 1991).

USM's contention (USM's Brief at 9) that dismissal or summary judgment cannot be based on the record in a preliminary injunction proceeding and the cases USM cites are inapposite. *Kennedy v. City of Cleveland*, 797 F.2d 297 (6th Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987), does not even deal with such an issue. *University of Texas v. Camenisch*, 451 U.S. 390 (1981), dealt with the question of the appeal of issues becoming moot after a preliminary injunction was issued, versus the appellate review of issues preserved by the injunction bond on a permanent injunction. *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618 (5th Cir. 1985) merely discusses the standards for injunctive relief. *Conley v. Gibson*, 355 U.S. 41 (1957), in fact recognizes that a claim may be dismissed for failure to state a claim when it appears "beyond doubt" that the claimant can prove no facts entitling him to relief. *Conley*, 355 U.S. at 45-46.

This case did not turn on any distinction between the tests for issuing an injunction versus dismissal versus summary judgment. Dismissal of USM's suit was based on the fact the record established beyond question that Texas has a clearly articulated regulatory policy applicable to the conduct in question, and that, in Docket 9090, the Texas PUC is actively regulating the very conduct at issue in the suit that was dismissed. Whether viewed as a dismissal under Rule 12(b)(6), or as a summary judgment under Rule 56, the result below is correct.

The lower court's function was to determine whether there was a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Review of PURA, the reported Texas PUC decisions, and Texas PUC Docket 9090 demonstrated that there can be no *genuine* issue of fact that both prongs of the *Midcal* test are satisfied. The Fifth Circuit's decision is clearly supported by the record and USM has not offered any significant probative evidence contradicting the result below. Judgment dismissing the complaint was proper. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Where, as here, "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec.* case, *supra*, 475 U.S. 574, 587 (1986); *First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968).

The dismissal of USM's complaint was procedurally correct. Reliance by the courts below on matters appropriate for judicial notice did not convert SWBT's motion to dismiss into a summary judgment motion. Even if the Fifth Circuit considered this case as an appeal from the granting of summary judgment in SWBT's favor, there is no error because USM had full opportunity to respond, and did in fact submit materials outside the pleadings. The record below is clear that USM has no cause of action against SWBT under the *Midcal* test.

IV.

THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT THE SPECIFIC CONDUCT COMPLAINED OF BY PETITIONER IS BEING ACTIVELY REGULATED BY THE TEXAS PUC.

USM argues the conduct in question has not been regulated by the State of Texas. USM asserts the regulation of SWBT's conduct

by the PUC goes no further than the setting of Respondent's rates. (USM's Brief, pp. 16-19, 22-26). In fact, however, the Texas PUC is specifically regulating the exact conduct of SWBT that is the subject of USM's complaint.

The active supervision of SWBT's activities by the Texas PUC is clear. Citing numerous reported Texas PUC decisions concerning SWBT, the Fifth Circuit correctly concluded that the Texas PUC actually and actively supervises the policies embodied in PURA. *Metro III*, 988 F.2d at 606-07.

The Texas PUC's supervision of SWBT goes well beyond the general; the PUC is directly involved in addressing the same issues raised by USM in the district court. USM's basic complaint before the district court was that SWBT is threatening to cut off telephone lines USM uses to provide its metro service. (USM's Statement of the Case, Brief, p. 2). As the court of appeals noted, this identical issue is before the Texas PUC in Docket 9090. *Metro III*, 988 F.2d at 606. Order No. 8 (Appendix R) in Texas PUC Docket 9090, establishes as the specific issues in the Complaint Case:

(1) Whether U.S. Metroline is in violation of the tariffs under which it is receiving service from SWB;

(2) Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provision of law, within the meaning of PURA, § 42;

(3) If the answers to the first two questions are in SWB's favor, whether SWB should be permitted to terminate USM Metroline's existing service under those tariff provisions pursuant to P.U.C. Subst. R. 23.46.

Not only are the "very same issues" before the Texas PUC; that agency has granted USM interim relief prohibiting SWBT

from terminating USM's service while Docket 9090 is pending, and requiring that SWBT provide new telephone lines and numbers to USM upon request. *(See*, Appendix Q).

It is hard to envision more active supervision that clearly meets the *Ticor* requirements. Because SWBT is subject to the jurisdiction and control of the Texas PUC, it cannot terminate Petitioner's service unless and until the issues in Texas PUC Docket 9090 are resolved in its favor and the interim relief granted Petitioner is dissolved. Docket 9090 is still pending before the PUC (*see*, Appendix S), and USM is still receiving the service which is at issue in Docket 9090 and in this case. Clearly, the Texas PUC is actively enforcing a regulatory scheme fully compliant with the second prong of *Midcal*, as expanded upon in *Ticor.*

V.

CERTIORARI IS NOT APPROPRIATE TO REVIEW INFERIOR COURTS' ANALYSIS OF THE FACTS.

Based on matter appropriate for judicial notice and "an extensive record, developed in detail during the proceedings for injunctive relief" (*Metro III*, 988 F.2d at 603), the district court and the Fifth Circuit both concluded that both prongs of the *Midcal* test had been met. Certiorari is not appropriate to review findings of fact. *N.L.R.B. v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 176 n. 8 (1981); *United States v. Johnston,* 268 U.S. 220, 227 (1925). In this case, both the district court and the Fifth Circuit made concurrent fact findings that both prongs of the *Midcal* test had been made, leading to the legal conclusion that SWBT's conduct was immune under the state-action doctrine. Absent a very obvious and exceptional showing of error, this Court does not normally review such findings of fact. *Graver Tank & Mfg. Co. v. Linde Air Products D. Co.*, 336 U.S. 271, 275 (1949); *United States v. Doe*, 465 U.S. 605, 614 (1984); *Berenyi v. District Director,*

Immigration and Naturalization Service, 385 U.S. 630, 635 (1967); *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 n. 15 (1984). Apart from making allowance for expected adversarial zeal on the part of USM's counsel, there is no room for doubt the findings of the courts below are correct concerning the *Midcal* test.

VI.

THE AFFIDAVITS SUBMITTED BY USM, WHILE IRRELEVANT, ARE NOT APPROPRIATELY CONSIDERED BY THIS COURT BECAUSE THEY WERE NOT PART OF THE RECORD BELOW.

USM has submitted affidavits of its counsel (Appendix N) and that of Mr. Taylor (Appendix O) asserting that, contrary to the Fifth Circuit's express language, USM did not stipulate that this case could be viewed as an appeal from the grant or denial of a summary judgment motion. USM counsel's affidavit also accuses one of the Fifth Circuit judges of stating his willingness to ignore *Ticor* precedent. Given the issue at hand, namely, that the Fifth Circuit correctly applied *Ticor,* and that dismissal and judgment for SWBT was clearly appropriate based on the record, these affidavits are no more than a curiosity. However, SWBT suggests to the Court that such affidavits are not appropriate for consideration because they were first introduced to the Supreme Court, and are "not in the record of the proceedings below." *FW/PBS v. City of Dallas*, 493 U.S. 215, 235 (1990). The affidavits should, except for their novelty value, be stricken and ignored. *Russell v. Southard,* 12 How. 139, 158-59 (1851); *Hopt v. Utah,* 14 U.S. 488, 491-92 (1885).

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX Q — DOCKET 9090, ORDER NO. 4

DOCKET NO. 9090

PUBLIC UTILITY COMMISSION OF TEXAS

COMPLAINT OF DFW METRO LINE SERVICES AGAINST SOUTHWESTER BELL TELEPHONE COMPANY

ORDER NO. 4
PREHEARING ORDER AND NOTICE OF HEARING

A prehearing conference was held in this docket on November 30, 1989. The following persons entered appearances at the conference: Mr. Ray G. Besing for DFW Metro Line Services (DFW Metro Line), Mr. Richard Billeaud for Southwestern Bell Telephone Company (SWB), and Ms. Pamela J. Mabry and Mr. Stephen Morris for the Commission's General Counsel, in the public interest. After negotiations, the parties were able to agree upon the granting of interim relief, subject to certain conditions, and upon procedures and a schedule to govern this proceeding. Pursuant to that agreement and P.U.C. PROC. R. 21.83(c), the ALJ issues the following order.

I. Interim Relief

DFW Metro Line's request for interim relief is GRANTED under the conditions set forth below. While this complaint is pending before the Commission, SWB shall not terminate service to DFW Metro Line and shall provide new telephone lines and numbers to DFW Metro Line upon request. The granting of interim relief is conditioned upon DFW Metro Line's obtaining as security a letter of credit in the amount of $50,000.00, payable to SWB in the event SWB prevails in this dispute. The original letter of credit shall be delivered to SWB by 5:00 p.m. December 8, 1989. A copy

of the letter of credit shall be delivered to the Commission's General Counsel and five copies filed with the Commission's filing clerk. The interim relief granted herein, including procedures for collection on the letter of credit in the event SWB prevails on the merits in this case, shall be governed by Tex.R.Civ.P. 680 *et seq.* and other relevant statutes and rules.

If DFW Metro Line has not been able to secure the letter of credit, the parties shall file a written pleading informing the ALJ of that fact by 4:00 p.m. December 11, 1989. In that event, the interim hearing will be reconvened at 10:00 a.m. December 14, 1989, for the taking of evidence on DFW Metro Line's request for interim relief.

II. Hearing Schedule and Filing Deadlines

A. Hearing on the Merits

The hearing on the merits will commence at 10:00 a.m. Monday, April 9, 1990, at the Commission's offices, 7800 Shoal Creek Boulevard, Austin, Texas.

B. Discovery

1. Requests for Information shall be filed by 4:00 p.m. Friday, March 16, 1990.

2. Depositions shall be taken no later than Monday, April 2, 1990.

3. Additional documents or information requested in the course of depositions shall be supplied by 4:00 p.m. Thursday, April 5, 1990.

4. Objections to RFIs shall be filed within seven working days of receipt of the RFI. Motions to compel shall be filed with five working days of receipt of the objection to the RFI in question. The parties shall make good faith efforts to resolve their disputes by discussion and negotiation before filing objections and motions to compel.

C. Testimony and Motions to Strike

1. DFW Metro Line shall prefile its direct testimony and exhibits by 4:00 p.m. Friday, January 26, 1990.

2. SWB shall prefile its direct testimony and exhibits by 4:00 p.m. Friday, March 2, 1990.

3. The General Counsel shall prefile his direct testimony and exhibits by 4:00 p.m. Monday, March 26, 1990.

4. DFW Metro Line shall prefile its rebuttal testimony and exhibits by 4:00 p.m. Friday, April 6, 1990.

5. Motions to strike portions of a party's direct testimony shall be filed by 4:00 p.m. Thursday, April 5, 1990. Responses to motions to strike and objections to rebuttal testimony may be made orally at the hearing on the merits. The ALJ will not consider oral objections to timely-filed direct testimony.

SIGNED AT AUSTIN, TEXAS, on this the *1st* day of December, 1989.

PUBLIC UTILITY COMMISSION OF TEXAS

s/ Henry D. Card
HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

APPENDIX R — DOCKET 9090, ORDER NO. 8

DOCKET NO. 9090

PUBLIC UTILITY COMMISSION OF TEXAS

COMPLAINT OF DFW METROLINE SERVICES AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY

ORDER NO. 8
GRANTING MOTION TO ESTABLISH PROCEDURAL SCHEDULE, RULING ON SCOPE, AND GIVING NOTICE OF PREHEARING CONFERENCE

After a lengthy period of abatement, Southwestern Bell Telephone Company (SWB), the respondent in this case, filed a Motion to Establish a Procedural Schedule Leading to a Hearing on the Merits. The complainant, U.S. Metro Line Services, Inc.,[1] opposes the motion. This order grants SWB's motion and rules on the scope of the proceeding.

The gist of U.S. Metro Line's argument is that it is presently involved as an intervenor in Docket Nos. 9618, 9640, and 9796. The scope and definition of "local exchange service" will be addressed in those dockets and in the staff's pending rulemaking Project No. 9708. Docket Nos. 9618 and 9640 are presently abated until Docket No. 9796 is decided.

Part of U.S. Metro Line's complaint is that it is illegal for SWB to attempt, through its tariffs, to restrict local exchange service to the detriment of its competitors. Therefore, according to U.S. Metro Line, it would be wasteful to reactivate this case until

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1. Since the complaint was filed, DFW MetroLine Services, a partnership, has become U.S. Metro Line Services, Inc.

the definition of local exchange service is determined in Docket 9796, the other dockets, and/or the rulemaking. U.S. Metro Line also points out that it has limited resources and cannot afford to actively participate in this docket and the other proceedings.

SWB agrees that the definition of local exchange service will be clarified in the other proceedings. According to SWB, however, that definition is not at issue here. The real issue, according to SWB, is whether U.S. Metro Line is illegally providing service in ways contrary to the tariffs under which it is receiving service. SWB contends that U.S. Metro Line is wrongfully using the Radio Common Carrier and Centrex tariffs to provide interexchange service that should be taken under SWB's access service tariff.

In order to rule on this issue, the ALJ must determine the scope of Docket No. 9796 and the scope of this docket.

The scope of Docket No. 9796 was set forth in Examiner's Order No. 4 in that case:

> From a review of the pleadings the examiner has determined that the issues in this docket are: 1) whether the four named respondents are providing local exchange service as defined in the current Commission rule; and 2) whether the four named respondents should be required to cease and desist their operations until they obtain a certificate of convenience and necessity from the Commission. All other issues shall be deferred for consideration in Docket No. 9618, the generic proceeding.

U.S. Metro Line is not one of the four named respondents in

Docket No. 9796. Nevertheless, its point would be well taken if it were in the same situation as those respondents, so that its fate would be determined by the decision in Docket No. 9796. It is not in the same situation, however. Although SWB is seeking to cut off U.S. Metro Line's existing service, SWB is not claiming that U.S. Metro Line should be certificated as a local exchange carrier. Instead SWB is claiming that U.S. Metro Line is providing interexchange service between Dallas and Fort Worth, in violation of the tariffs under which it receives service from SWB. Neither U.S. Metro Line's situation nor SWB's reaction to it are the same as in Docket No. 9796.

The ALJ finds that the issues in this complaint case, Docket No. 9090, are as follows:

> 1) Whether U.S. Metro Line is in violation of the tariffs under which it is receiving service from SWB;
>
> 2) Whether the relevant provisions of those tariffs are unreasonable or in any way in violation of any provision of law, within the meaning of PURA Section 42;
>
> 3) If the answers to the first two questions are in SWB's favor, whether SWB should be permitted to terminate U.S. Metro Line's existing service under those tariff provisions pursuant to P.U.C. SUBST. R. 23.46.

Because the issues in this complaint are not the same as those raised in the other pending dockets in which U.S. Metro Line is involved, SWB's motion is GRANTED. Pursuant to P.U.C. PROC. 21.83, a prehearing conference will be held in this docket beginning at 10:00 a.m. Wednesday, July 24, 1991. The following matters will be considered at the prehearing conference:

Appendix R

1) resolution of pending motions:

2) establishment of procedural schedule, including deadlines and procedures for discovery and the prefiling of testimony;

3) setting of the hearing on the merits.

SIGNED AT AUSTIN, TEXAS, on this the *3rd* day of July, 1991.

PUBLIC UTILITY COMMISSION OF TEXAS

s/ Henry D. Card
HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

APPENDIX S — DOCKET 9090, ORDER NO. 36

DOCKET NO. 9090

PUBLIC UTILITY COMMISSION OF TEXAS

COMPLAINT OF U.S. METRO LINE SERVICES, INC. AGAINST SOUTHWESTERN BELL TELEPHONE COMPANY

ORDER NO. 36

REQUIRING ADDITIONAL INFORMATION REGARDING SOUTHWESTERN BELL TELEPHONE COMPANY'S MOTION FOR INTERIM RELIEF AND TO REOPEN THE RECORD AND DENYING IN PART AND GRANTING IN PART U.S. METROLINE'S MOTION FOR INTERIM RELIEF

On May 10, 1993, Southwestern Bell Telephone Company (SWB) filed its Motion for Interim Relief and to Reopen the Record in this docket. U.S. Metroline Services, Inc. (USM) replied to that motion on May 19, 1993, and filed its own Motion for Interim Relief, to which SWB responded on May 28.

The ALJ does not have adequate information to rule on SWB's motion. Therefore the parties SHALL FILE their answers to the questions set forth below by 3:00 p.m. Monday, June 28, 1993. Pleadings in response to those answers shall be filed no later than 3:00 p.m. Wednesday, July 7, 1993. In addition, General Counsel is ordered to respond to SWB's motion, and to the answers required by this order, by 3:00 p.m. Wednesday, July 7, 1993.

USM's Motion for Interim Relief is DENIED IN PART AND GRANTED IN PART. SWB shall provide Call Transfer-Individual to USM in accordance with SWB's tariff and the representations

contained in SWB's May 28th reply to USM's motion. SWB shall not be required to provide Call Transfer Disconnect.

SWB's Motion for Interim Relief and to Reopen the Record

USM provides what it calls "metro service" and what SWB calls "interexchange service" between the Dallas and Fort Worth metropolitan areas. In its motion, SWB complains that an unnamed interexchange carrier (IXC) is completing both intraLATA and interLATA long distance calls through USM's facilities. Acting on a complaint from a competing IXC, SWB personnel tested two customer-owned coin telephones in Dallas by placing calls over those phones and auditing the lines at the central office that serves them. According to the affidavit of SWB manager Daniel L. Poole, an intraLATA call to Denton and an inter LATA call to San Antonio were placed via internal dialers over one of the Centrex station line numbers assigned to USM.

The parties' pleadings have left the ALJ unclear on certain technical questions and on the significance of the alleged use of USM's facilities to complete calls beyond the Dallas-Fort Worth metropolitan area. The ALJ is loathe to decide about reopening the record in this case without a firmer grasp of those matters. Therefore the parties are ordered to answer the following questions, and to reply to those answers, within the deadlines set forth above:

SWB shall respond to the following questions:

1. SWB is complaining that intraLATA and interLATA long distance calls are being completed over Centrex numbers assigned to USM. Would the use of USM's lines for that purpose eliminate or reduce the access charges payable by the IXC to SWB? If so,

please explain. If not, how does that alleged use of USM's lines benefit the IXC or harm SWB or competing IXCs?

2. USM has replied that each of the Centrex lines leased by USM from SWB has a standard toll restriction feature that prevents a user from completing a long distance or toll call over those lines. Please respond.

USM shall respond to the following questions:

1. Does USM believe that its switch or the restrictions on its Centrex lines preclude calls from being placed and routed in the manner described in Mr. Poole's affidavit? In other words, does USM contend that the matters averred to in that affidavit are technically impossible?

2. USM has responded that its switch does not permit any of its metro service customers to complete calls over its service beyond the boundaries of the Dallas metropolitan exchange area and Fort Worth metropolitan exchange area. If calls can, in fact, be completed as described by Mr. Poole, does USM agree that such a use of its system is improper and should be discontinued?

3. Please explain more fully the toll restriction feature that prevents any user from completing a long distance or toll call over USM's Centrex lines.

USM's Motion for Interim Relief

Order No. 4 in this case requires SWB to provide new lines and numbers to USM upon request. USM complains that SWB has failed to provide two features — Call Transfer-Individual and Call Transfer Disconnect — in conjunction with those new lines and

that its failure to do so discriminates against USM.

Call Transfer-Individual allows the station user to transfer an incoming call to any other Centrex station. According to SWB, it has never failed to provide Call Transfer-Individual, which is a standard feature of Centrex and is provided without charge on every Centrex line. SWB would have to take special action to block the service and can find no indication that any such special procedures have been undertaken.

Although the parties inexplicably disagree as to what is occurring with Call Transfer-Individual, they agree that USM is entitled to receive the feature. SWB is ORDERED to provide Call Transfer-Individual with the lines it provides to USM. To that extent, USM's motion is GRANTED.

Call Transfer Disconnect (CTD), which is offered with SWB's PLEXAR I service, allows the customer to transfer calls outside that system. Under SWB's PLEXAR I tariff, CTD is not available to EMS or EACS customers and cannot be used to expand a local calling scope. According to SWB, it formerly provided the feature on a special assembly basis to some Centrex customers, but ceased processing such requests after discovering that CTD could be used with optional EMS to expand calling scopes.

With regard to Call Transfer Disconnect, USM's motion is DENIED. The ALJ agrees that SWB is not discriminating unreasonably in its provision of CTD. Nor is the provision of that feature required under its Centrex tariff offering. Moreover, Order No. 4, which was designed to ensure that USM could continue to operate and receive new lines during the pendency of this docket, does not require SWB to provide Call Transfer Disconnect.

SIGNED AT AUSTIN, TEXAS the *18th* day of June 1993.

Appendix S

PUBLIC UTILITY COMMISSION OF TEXAS

s/ Henry D. Card
HENRY D. CARD
ADMINISTRATIVE LAW JUDGE

APPENDIX T — PLAINTIFF'S ORIGINAL PETITION

IN THE DISTRICT COURT OF DALLAS COUNTY, TEXAS

____ JUDICIAL DISTRICT

U.S. METROLINE SERVICES, INC.

PLAINTIFF

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, MONA FRAME, AND JOHN IVEN

DEFENDANTS

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, U.S. METROLINE SERVICES, INC. ("Plaintiff") and files its Original Petition, complaining of Defendant Southwestern Bell Telephone Company ("SWB" or "Bell"), and for causes of action will respectfully show the court the following:

PARTIES

1. Plaintiff U.S. Metroline Services ("Metroline") is a corporation organized under the laws of the State of Texas, having its principal office and place of business in Dallas, Texas.

2. Defendant Southwestern Bell Telephone Company, is a corporation organized under the laws of the State of Missouri and

may be served with process through its registered agent Robert M. Lynch, 203 S. Akard, Room 3706, Dallas, Texas, 75202.

3. Defendant Mona Frame ("Frame") is a resident of Dallas County, Texas and may be served with process at her residence address, 2329 Apple Valley, Garland, Texas.

4. Defendant John Iven ("Iven") is a resident of Tarrant County, Texas and may be served with process at his residence address, 124 Kay Court, Hurst, Texas 76054.

JURISDICTION

5. Jurisdiction is proper in this Court because the amount in controversy, exclusive of interest and costs is within the jurisdictional limits of this Court.

VENUE

6. Venue is proper in Dallas County pursuant to Section 15.001 of the Texas Civil Practice & Remedies Code, because Plaintiff's causes of action accrued, in whole or in part, in Dallas County.

FACTS

7. Plaintiff provides communications services, including what is commonly known as "metro service" (a toll-free calling service), within the Dallas-Ft. Worth metroplex, in direct competiton with Defendant.

8. Defendant Bell provides, among other communication services, Extended Metropolitan Service or "EMS," which is the

same service that Plaintiff provides. In providing its EMS in the Dallas-Ft. Worth metroplex, Defendant provides and offers its service to the same customer group and within the same geographical area in which Plaintiff provides its service. Defendant also provides its EMS service in other similar metropolitan areas in the states of Texas, Oklahoma, Arkansas, Kansas and Missouri.

9. Defendants Frame and Iven were, at all time pertinent hereto, agents, servants and employees of Defendant Bell, and were at all times acting within the course and scope of their employment with, and under the direction of, Defendant Bell. These Defendants' wrongful conduct is outlined in paragraph 13 below. All other references to "Defendant," in the singular, are intended to refer to Defendant Bell and, where applicable, also to Defendants Frame and Iven.

10. Before Plaintiff's genesis, the entrepreneurs who formed Plaintiff had recognized the need for a technologically innovative and less expensive extended area metropolitan calling service within the Dallas-Ft. Worth metroplex and other areas in the United States, including Missouri, Kansas, New York, Florida and California, some of which are markets in which Defendant also markets its metro service.

11. In order to provide a metro service, essential facilities such as telephone lines and numbers are required. Defendant owns and controls these technical components of the service. In order for Plaintiff to provide its metro service, it must obtain telephone lines, numbers and listings from Defendant, as Defendant has exclusive control over these facilities and the duplication of those facilities is not economically feasible.

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12. Beginning in approximately early, 1988, Plaintiff began providing metro service, using facilities ordered from Defendant in 1987, 1988, and 1989.

13. Nearly a year and a half after Plaintiff had begun operations and had incurred substantial start-up expenses and other obligations, Defendants Frame and Iven, on behalf of Defendant Bell, wrote a letter to Plaintiff dated June 8, 1989 and received by Plaintiff on June 12, 1989, threatening to terminate the services Bell had been providing Plaintiff for Plaintiff's metro service. Defendants have admitted that the reason for the threat was because Plaintiff was taking away some of Defendant Bell's metro service customers. Prior and subsequent to that "termination notice" letter of Defendants, Plaintiff attempted to dissuade Defendants from disconnecting the essential facilities — the Bell lines and numbers — needed for Plaintiff to stay in business. Defendants adamantly refused to reconsider and have, to the present, continued to threaten the disconnection of said lines and termination of said numbers.

14. Defendants have continued, on several occasions and as recently as May, 1993, to deprive or attempt to deprive Plaintiffs of essential and needed telephone facilities, features and services, in a continuing effort to impair and injure Plaintiff's business.

COUNT I

TEXAS ANTITRUST ACT § 15.05(b)

15. Defendant is the only provider of local exchange service in the Dallas-Ft. Worth exchange. Therefore, defendant is a monopoly, as that term is defined by law, and possesses monopoly power over local telephone services.

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16. In an attempt to preserve its monopoly position in the provisioning of local exchange services, and in particular metro service, Defendant has threatened, and continues to threaten, to terminate all the essential facilities it currently provides to Plaintiff, thereby threatening to effectively put Plaintiff out of business, permanently, at the moment of disconnection. Such acts constitute SWB's attempt to maintain its monopoly and are in violation of Section 15.05(b) of the Texas Free Enterprise and Antitrust Act of 1983, which provides that "it is unlawful for any person to monopoly, attempt to monopolize, or conspire to monopolize any part of trade or commerce." Tex. Bus. & Com. Code Ann. § 15.05(b).

17. Since Defendant's original threat to terminate Plaintiff's service, Defendant has engaged in other conduct that also violates § 15.05(b), including intentional refusals and delays in providing essential lines, facilities, features and numbers needed in Plaintiff's business.

18. Defendant has also refused to provide certain features which Plaintiff's customers have requested, which Defendant has the capability to provide on the lines it provides Plaintiffs, and which Defendant provides to customers other than Plaintiff, all in violation of § 15.05(b).

19. All of the above acts have been committed knowingly by Defendant.

20. Defendant's above-described conduct was and is the producing and proximate cause of damages to Plaintiff.

21. As a direct result of Defendant's conduct, Plaintiffs had to retain the undersigned attorneys to pursue this cause of action.

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Pursuant to Section 15.000 *et. seq.* of the Texas Free Enterprise & Antitrust Act of 1983, all attorney's fees that are reasonable and necessary in this cause, including any appeal, may be recovered by Plaintiffs.

COUNT II

NEGLIGENCE

22. Defendant's conduct is negligent and grossly negligent. Defendant and its agents failed to perform with ordinary care their contractual and common law duties to Plaintiffs. Defendant has displayed conscious and reckless disregard for Plaintiff's rights. Such conduct is a proximate cause of Plaintiff's above-described damages.

COUNT III

NEGLIGENT MISREPRESENTATION

23. Defendant's conduct constitutes negligent misrepresentation. Defendant failed to perform with ordinary care its contractual and common law duties to Plaintiffs. Specifically, Defendant knew or should have known, or were grossly negligent when they represented that the services Defendant agreed to provide Plaintiff would in the future, be available for Plaintiff's metro service business, and could be used for Plaintiffs' intended purpose.

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COUNT IV

FRAUD

24. Defendant has made a number of representations of material facts with respect to the lines, facilities, and services it has provided or agreed to provide to Plaintiff, including the representation that Defendant would provide lines and services requested and needed by Plaintiff for the provision of Plaintiff's metro service, knowing Plaintiff intended to use them to provide that metro service. Furthermore, Defendant made material misrepresentations as to the "features" available on those services and the time and manner in which they would be provided.

25. The representations were false when made. Furthermore, at the time Defendant made the false representations to Plaintiff, Defendant knew that they were false, or Defendant made them recklessly, without knowledge of the truth, as positive assertion.

23. Defendant made these misrepresentations intending that Plaintiff would act thereupon.

24. In reliance thereon, Plaintiff sought investors, ordered the misrepresented services and products from Defendant, and commenced business operations, all at an extensive capital outlay. In addition to those expenses, Plaintiff has also incurred substantial attorneys' fees in protecting itself from Defendant's attempts to terminate service and other conduct, which was proximately caused by Defendant's misrepresentations, thereby causing Plaintiff added injury.

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COUNT V

INTERFERENCE WITH BUSINESS AND CONTRACTUAL RELATIONS

25. By the aforesaid conduct, Defendants have maliciously interfered with Plaintiff's contractual relations with Plaintiff's customers, causing damages to Plaintiff, for which Plaintiff hereby sues.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that Defendants be cited according to law to appear and answer herein, and that after final trial Plaintiff have judgment against Defendants for those damages described above and in the full amount allowed by law, together with pre-judgment and post-judgment interest on such amount at the highest legal rate.

Plaintiffs further pray for additional damages pursuant to Section 15.21(a)(1) of the Texas Free Enterprise & Antitrust Act of 1983 for treble damages if the trier of fact finds that the above-described conduct was willful, flagrant, or intentional.

Plaintiff further prays for attorneys' fees that are reasonable and necessary in this cause and for costs of court.

Plaintiff further pray that punitive damages be assessed against Defendant.

Plaintiffs further pray for such other and further relief, at law or in equity, to which Plaintiffs may be justly entitled.

Appendix T

Respectfully submitted.

THE LAW OFFICES OF RAY G. BESING, P.C.

s/ Ray G. Besing
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